THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

REFERENCE ONLY

346.4
Mx. North Gall.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1902_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. WARMINGTON, Esq., K.C.
Vice-Chairman—F. A. BOSANQUET, Esq., K.C.

EX-OFFICIO MEMBERS.

SIR ROBERT B. FINLAY, Knt., M.P. . . ATTORNEY-GENERAL.
THE RIGHT HON. SIR EDWARD H. CARSON, Knt., M.P. } SOLICITOR-GENERAL.
THE RIGHT HON. SIR HENRY FOWLER, G.C.S.I., M.P., President of the Incorporated Law Society.

ELECTED MEMBERS.

W. C. RENSHAW, Esq., K.C.
T. ROLLS WARRINGTON, Esq., K.C. } Lincoln's Inn.

F. A. BOSANQUET, Esq., K.C.
M. C. BUSZARD, Esq., K.C. } Inner Temple.

C. M. WARMINGTON, Esq., K.C.
A. T. LAWRENCE, Esq., K.C. } Middle Temple.

JAMES MULLIGAN, Esq., K.C.
J. C. LEWIS COWARD, Esq., K.C. } Gray's Inn.

W. ENGLISH HARRISON, Esq., K.C., of the Middle Temple.
ROBERT F. NORTON, Esq., K.C., of Lincoln's Inn. } Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.

JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Sons, Coward & Hawksley), 30, Mincing Lane, E.C.
E. J. BRISTOW, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael), 1, Copthall Buildings, E.C. } Incorporated Law Society.

Secretary—PATRICK F. EVANS, Esq., 10 Old Square, Lincoln's Inn, London, W.C.

1902.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	G. I. FOSTER COOKE, W. LLOYD CABELL,	*Barristers-at-Law.*
Mr. Justice Kekewich AND Mr. Justice Joyce	C. C. M. DALE, G. A. STREETEN, H. B. HEMMING,	*Barristers-at-Law.*
Mr. Justice Byrne AND Mr. Justice Buckley	GEORGE MURRAY, W. COWELL DAVIES, FRANK EVANS, H. C. ROPER,	*Barristers-at-Law.*
Mr. Justice Farwell AND Mr. Justice Swinfen Eady	D. PITCAIRN, H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*

1902.—VOL. I.

LONDON:

Printed and Published for the Council of Law Reporting

BY WILLIAM CLOWES AND SONS, LIMITED,

DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

PUBLISHING OFFICE, 7, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

Earl of Halsbury	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir Richard Henn Collins	*Master of the Rolls.*
Sir Francis Henry Jeune	*President of the Probate, Divorce, and Admiralty Division.*
Sir Roland Vaughan Williams	*Lords Justices of the Court of Appeal.*
Sir Robert Romer	
Sir James Stirling	
Sir James Charles Mathew	
Sir H. H. Cozens-Hardy	
Sir Arthur Kekewich	*Justices of High Court, attached to Chancery Division.*
Sir E. W. Byrne	
Sir George Farwell	
Sir H. B. Buckley	
Sir Matthew I. Joyce	
Sir C. Swinfen Eady	
Sir Robert B. Finlay	*Attorney-General.*
Sir Edward H. Carson	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
24	foot-note (6)	4 R. R. 185	42 R. R. 176, 185.
268	16	"there is not"	"there is."

DAVENPORT *v.* MARSHALL.

82 The second line of the head-note should read: "to which the wife then was or she or her husband in her right should," etc.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1902, will be as follows:—

In the First Series,
[1902] 1 Ch. [1902] 2 Ch.

In the Second Series,
[1902] 1 K. B. [1902] 2 K. B. [1902] P.

In the Third Series,
[1902] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abrahams (S.) & Sons, *In re* –	695
Acetylene Illuminating Company *v.* United Alkali Company –	494
Aflalo *v.* Lawrence & Bullen, Limited – – – –	264
Anderson *v.* Berkley – –	936
——— *v.* Midland Railway Company – – – –	369
Attorney-General, Esam *v.* *In re* Wilkinson – – – –	841

B.

Bagot Pneumatic Tyre Company *v.* Clipper Pneumatic Tyre Company – – (C.A.)	146
Baily & Co. *v.* Clark, Son & Morland – – (C.A.)	649
Balfour *v.* Crace. *In re* Crace –	733
Bank of England, Oliver *v.* (C.A.)	610
Barnett's Trusts, *In re* – –	847
Barrow Hæmatite Steel Company, Bond *v.* – – –	353
Bartholomew *v.* Menzies. *In re* Weston – – – –	680
Beaumont, *In re.* Beaumont *v.* Ewbank – – – –	889
——— *v.* Ewbank. *In re* Beaumont – – – –	889
Beckett, Helyar *v.* *In re* Helyar – – – –	391
Beddington *v.* Beddington. *In re* Moses – – (C.A.)	100
Benjamin, *In re.* Neville *v* Benjamin – – – –	723
———, Neville *v.* *In re* Benjamin – – – –	723
Bennett *v.* Stone – – –	226
Berkley, Anderson *v.* – –	936
Boles and British Land Company's Contract, *In re* – –	244

PAGE

Bond *v.* Barrow Hæmatite Steel Company – – – – 353
Bozzelli, Husey-Hunt *v.* *In re* Bozzelli's Settlement – – 751
Bozzelli's Settlement, *In re.* Husey-Hunt *v.* Bozzelli – 751
Bradshaw, *In re.* Bradshaw *v.* Bradshaw – – – – 436
——— *v.* Bradshaw. *In re* Bradshaw – – – – 436
Bright's, Limited, and Osborne, *In re* – – – – 335
British Land Company and Boles' Contract, *In re* – – – 244
Brodie, Goddard *v.* *In re* Chisholm – – – – 457
Browne, Chapman *v.* (C.A.) 785
Bruyère, Pepin *v.* – (C.A.) 24
Burbidge, *In re* – (C.A.) 426
Burnand *v.* Waite. *In re* Seton-Smith – – – – 717

C.

Camp, Charrington & Co., Limited *v.* – – – 386
Carr, Wales *v.* – – – 860
Chapman *v.* Browne (C.A.) 785
Charrington & Co., Limited *v.* Camp – – – – 386
Chetwynd's Settlement, *In re.* Scarisbrick *v.* Nevinson – 692
Chisholm, *In re.* Goddard *v.* Brodie – – – – 457
Clark, Son & Morland, Baily & Co. *v.* – – (C.A.) 649
Clifford, *In re.* Scott *v.* Clifford 87
———-, Scott *v.* *In re* Clifford 87
Clinton (Pelham) *v.* Newcastle (Duke of) – – (C.A.) 34
Clipper Pneumatic Tyre Company, Bagot Pneumatic Tyre Company *v.* – (C.A.) 146
Cohen's Executors and London County Council, *In re* – – 187
Colls, Home and Colonial Stores, Limited *v.* – – (C.A.) 302
Crace, *In re.* Balfour *v.* Crace – 733
———-, Balfour *v.* *In re* Crace – 733
Crawfurd, Huxtable *v.* *In re* Huxtable – – – – 214

PAGE

Crompton (A. & A.) & Co.'s Trade-mark, *In re* – – 758
Crosskill, Morgan's Brewery Company *v.* – – – – 898

D.

Davenport *v.* Marshall – – 82
Davis, *In re.* Hannen *v.* Hillyer 876
Deep Sea Fishery Company's Claim. *In re* Fenwick, Stobart & Co. – – – – 507
Development Company of Central and West Africa, *In re* – 547
Deverges *v.* Sandeman, Clark & Co. – – – (C.A.) 579
Dixon, *In re.* Penfold *v.* Dixon 248
———, Penfold *v.* *In re* Dixon 248
Dunning, Hounsell *v.* – – 512

E.

Ebenezer Timmins & Sons, Limited, *In re* – – – 238
Elcock, Gossling *v.* *In re* Gossling – – – – 945
Elgood *v.* Jones. Elgood *v.* Kinderley. *In re* Jones – 92
——— *v.* Kinderley. Elgood *v.* Jones. *In re* Jones – – 92
Esam *v.* Attorney-General. *In re* Wilkinson – – – 841
Ewbank, Beaumont *v.* *In re* Beaumont – – – – 889

F.

F. *v.* F. – – – – 688
Farmer *v.* Pitt – – – 954
Faulder & Co.'s Trade-mark, *In re* – – (C.A.) 125
Fenwick, Stobart & Co., Limited, *In re.* Deep Sea Fishery Company's Claim – – 507
Fergusson's Will, *In re* – – 483
Ferneley's Trusts, *In re* – – 543
Finchley Electric Light Company *v.* Finchley Urban Council – 866
Finchley Urban Council, Finchley Electric Light Company *v.* – 866

PAGE

Fitzroy *v.* Hunloke. *In re* Hunloke's Settled Estates – 941
Fletcher *v.* Lancashire and Yorkshire Railway Company – 901
Ford, *In re.* Ford *v.* Ford – 218
—— *v.* Ford. *In re* Ford – 218
Freake, Kinnaird *v.* *In re* Freake's Settlement – – 97
Freake's Settlement, *In re.* Kinnaird *v.* Freake – – 97
Frith, *In re.* Newton *v.* Rolfe – 342

G.

Gardiner, Jones *v.* – – – 191
Gavin and Lloyds, Kelly's Directories, Limited *v.* (C.A.) 631
Gibbons, Owen *v.* – (C.A.) 636
Goddard *v.* Brodie. *In re* Chisholm – – – – 457
Godwin *v.* Schweppes, Limited – 926
Gophir Diamond Company *v.* Wood – – – – 950
Gossling, *In re.* Gossling *v.* Elcock – – – – 945
——— *v.* Elcock. *In re* Gossling – – – – – 945
Greenwell *v.* Porter – – 530
Griffin, *In re.* Griffin *v.* Griffin (C.A.) 135
——— *v.* Griffin. *In re* Griffin (C.A.) 135
Ground Rent Development Company *v.* West – – – 674
Grove *v.* Portal – – – 727
Guthrie's Settled Estates, *In re* 942, n.
Gyles, McCheane *v.* (C.A.) 287
——————— (No. 2) – 911

H.

Handman and Wilcox's Contract, *In re* – – (C.A.) 599
Hannen *v.* Hillyer. *In re* Davis 876
Harrison, Kelcey *v.* *In re* Peacock's Settlement – – 552
Hart, Ireland *v.* – – – 522
Haslam & Hier-Evans, *In re* (C.A.) 765
Helyar, *In re.* Helyar *v.* Beckett 391
——— *v.* Beckett. *In re* Helyar 391

PAGE

Herbert Reeves & Co., *In re* (C.A.) 29
Hill, *In re.* Hill *v.* Hill – – 537
——————— (C.A.) 807
Hill *v.* Hill. *In re* Hill – – 537
——————— (C.A.) 807
Hillyer, Hannen *v.* *In re* Davis 876
Hird, Pepperell *v.* – – – 477
Home and Colonial Stores, Limited *v.* Colls – (C.A.) 302
Honywood *v.* Honywood – – 347
Hounsell *v.* Dunning – – 512
Howgate and Osborn's Contract, *In re* – – – – 451
Hunloke, Fitzroy *v.* *In re* Hunloke's Settled Estates – 941
Hunloke's Settled Estates, *In re.* Fitzroy *v.* Hunloke – – 941
Hunt *v.* Luck – (C.A.) 428
Husey *v.* London Electric Supply Corporation – (C.A.) 411
Husey-Hunt *v.* Bozzelli. *In re* Bozzelli's Settlement – – 751
Huxtable, *In re.* Huxtable *v.* Crawfurd – – – – 214
——— *v.* Crawfurd. *In re* Huxtable – – – – 214

I.

Ireland *v.* Hart – – – 522

J.

Jackson's Settled Estate, *In re* – 258
Jacobs *v.* Morris – (C.A.) 816
Jones, *In re.* Elgood *v.* Kinderley. Elgood *v.* Jones – – 92
——, Elgood *v.* Elgood *v.* Kinderley. *In re* Jones – 92
—— *v.* Gardiner – – – 191
Joplin Brewery Company, *In re* 79

K.

Kane, Reigh *v.* *In re* Partington 711
Kelcey *v.* Harrison. *In re* Peacock's Settlement – – 552
Kelly's Directories, Limited *v.* Gavin and Lloyds (C.A.) 631
Kensington (Baron), *In re.* Earl of Longford *v.* Baron Kensington – – – 203

	PAGE
Kensington (Baron), Longford (Earl of) *v.* *In re* Baron Kensington – – –	203
Kerr, Smith *v.* – (C.A.)	774
Key (W.) & Son, Limited, *In re*	467
Kinderley, Elgood *v.* Elgood *v.* Jones. *In re* Jones – –	92
Kinnaird *v.* Freake. *In re* Freake's Settlement – –	97

L.

Lancashire and Yorkshire Railway Company, Fletcher *v.* –	901
Lawrence & Bullen, Limited, Aflalo *v.* – – – –	264
Leas Hotel Company, *In re.* Salter *v.* Leas Hotel Company	332
———, Salter *v.* *In re* Leas Hotel Company –	332
Leigh *v.* Leigh – – –	400
Lisle *v.* Reeve – (C.A.)	53
London and North Western Railway Company *v.* Westminster Corporation – – –	269
London County Council and Cohen's Executors, *In re* –	187
London Electric Supply Corporation, Husey *v.* – (C.A.)	411
Longford (Earl of) *v.* Kensington (Baron). *In re* Baron Kensington – – –	203
Luck, Hunt *v.* – (C.A.)	428
Lurgan's (Lord) Case. *In re* Metal Constituents, Limited –	707

M.

McCheane *v.* Gyles – (C.A.)	287
——— *v.* —— (No. 2) –	911
Marshall, Davenport *v.* – –	82
Marten, *In re.* Shaw *v.* Marten (C.A.)	314
———, Shaw *v.* *In re* Marten (C.A.)	314
Menzies, Bartholomew *v.* *In re* Weston – – – –	680
Metal Constituents, Limited, *In re.* Lord Lurgan's Case –	707
Midland Railway Company, Anderson *v.* – – –	369
Morgan's Brewery Company *v.* Crosskill – – – –	898
Morris, Jacobs *v.* – (C.A.)	816
Moses, *In re.* Beddington *v.* Beddington – (C.A.)	100
Mysore Reefs (Kangundy) Mining Company, Stephens *v.* –	745

N.

Neaverson *v.* Peterborough Rural Council – – (C.A.)	557
Neville *v.* Benjamin. *In re* Benjamin – – – –	723
Nevinson, Scarisbrick *v.* *In re* Chetwynd's Settlement – –	692
Newcastle (Duke of), Pelham Clinton *v.* – – (C.A.)	34
Newton *v.* Rolfe. *In re* Frith –	342
Nixon *v.* Smith. *In re* Timmis	176
Norris, *In re* – – – –	741
Northleach Rural Council, Smith *v.* – – – – –	197
Nottingham Permanent Benefit Building Society, Thurstan *v.* (C.A.)	1

O.

Oliver *v.* Bank of England (C.A.)	610
Osborn and Howgate's Contract, *In re* – – – –	451
Osborne and Bright's, Limited, *In re* – – – –	335
Owen *v.* Gibbons – (C.A.)	636

P.

Palmer *v.* Thames Conservators	163
Partington, *In re.* Reigh *v.* Kane – – – –	711
Peacock's Settlement, *In re.* Kelcey *v.* Harrison – –	552
Pelham Clinton *v.* Newcastle (Duke of) – – (C.A.)	34
Penfold *v.* Dixon. *In re* Dixon	248
Pepin *v.* Bruyère – (C.A.)	24
Pepperell *v.* Hird – – –	477
Peterborough Rural Council, Neaverson *v.* – (C.A.)	557
Pitt, Farmer *v.* – – –	954

PAGE

Pitt Rivers, *In re*. Scott *v.* Pitt Rivers – – (C.A.) 403
———, Scott *v.* *In re* Pitt Rivers – – (C.A.) 403
Portal, Grove *v.* – – – 727
Porter, Greenwell *v.* – – 530

R.

Reeve, Lisle *v.* – (C.A.) 53
Reeves (Herbert) & Co., *In re*. (C.A.) 29
Reigh *v.* Kane. *In re* Partington 711
Richards, *In re*. Uglow *v.* Richards – – – – 76
———, Uglow *v.* *In re* Richards – – – – 76
Rolfe, Newton *v.* *In re* Frith – 342

S.

Salter *v.* Leas Hotel Company. *In re* Leas Hotel Company – 332
Sandeman, Clark & Co., Deverges *v.* – – – (C.A.) 579
Scarisbrick *v.* Nevinson. *In re* Chetwynd's Settlement – – 692
Schmarr, *In re* – (C.A.) 326
Schweppes, Limited, Godwin *v.* 926
Scott, *In re*. Scott *v.* Scott – 918
—— *v.* Clifford. *In re* Clifford 87
—— *v.* Pitt Rivers. *In re* Pitt Rivers – – (C.A.) 403
—— *v.* Scott. *In re* Scott – 918
Scottish Equitable Life Assurance Society, *In re* A Policy No. 6402 of – – – 282
Selot's Trust, *In re* – – – 488
Seton-Smith, *In re*. Burnand *v.* Waite – – – – 717
Shaw *v.* Marten. *In re* Marten (C.A.) 314
Smith *v.* Kerr – (C.A.) 774
———, Nixon *v.* *In re* Timmis 176
—— *v.* Northleach Rural Council – – – – 197
South Western of Venezuela (Barquisimeto) Railway Company, *In re* – – – 701
Spiral Globe, Limited, *In re* – 396

PAGE

Stephens *v.* Mysore Reefs (Kangundy) Mining Company – 745
Stone, Bennett *v.* – – – 226

T.

Thames Conservators, Palmer *v.* 163
Thurstan *v.* Nottingham Permanent Benefit Building Society (C.A.) 1
Timmis, *In re*. Nixon *v.* Smith 176
Trenchard, *In re*. Trenchard *v.* Trenchard – – – – 378
——— *v.* Trenchard. *In re* Trenchard – – – – 378

U.

Uglow *v.* Richards. *In re* Richards – – – – 76
"Uneeda" Trade-mark, *In re* (C.A.) 783
United Alkali Company, Acetylene Illuminating Company *v.* 494

W.

Waite, Burnand *v.* *In re* Seton-Smith – – – – 717
Wales *v.* Carr – – – 860
Watt, Whitbread & Co., Limited *v.* – – – (C.A.) 835
West, Ground Rent Development Company *v.* – – – 674
Westminster Corporation, London and North Western Railway Company *v.* – – – 269
Weston, *In re*. Bartholomew *v.* Menzies – – – – 680
Whitbread & Co., Limited *v.* Watt – – (C.A.) 835
Wilcox and Handman's Contract, *In re* – – (C.A.) 599
Wilkinson, *In re*. Esam *v.* Attorney-General – – 841
Willis, *In re*. Willis *v.* Willis (C.A.) 15
—— *v.* Willis. *In re* Willis (C.A.) 15
Wood, Gophir Diamond Company *v.* – – – – 950

TABLE OF CASES CITED.

A.

		PAGE
Ailesbury's (Marquis) Settled Estates, In re	[1892] 1 Ch. 506	604
Aldous *v.* Cornwell	L. R. 3 Q. B. 573	453
Alexander *v.* Automatic Telephone Company	[1900] 2 Ch. 56	708
Allen *v.* M'Pherson	1 H. L. C. 191	937
Alms Corn Charity, In re	[1901] 2 Ch. 750	431
Amalgamated Syndicate, In re	[1897] 2 Ch. 600	748
Ames, In re	[1893] 2 Ch. 479	381
Amesbury *v.* Brown	cited 2 Eden, 159	638
Anderson's Trade Mark, In re	26 Ch. D. 409	129
Andrews *v.* Gas Meter Company	[1897] 1 Ch. 361	360
Andros, In re	24 Ch. D. 637	484
Anon.	Cro. Eliz. 431	642
Apollinaris Company's Trade Marks, In re	[1891] 2 Ch. 186	134, 761
Arbenz' Application, In re	35 Ch. D. 248	129
Archibald D. Dawnay, Limited, In re	W. N. (1900) 152	239
Armitage *v.* Coates	35 Beav. 1	545
Armstrong, In re	17 Q. B. D. 521	553
Ashbury Railway Carriage and Iron Company *v.* Riche	L. R. 7 H. L. 653	373
Ashby *v.* Costin	21 Q. B. D. 401	138
Ashmore's Trusts, In re	L. R. 9 Eq. 99	947
Aspinwall *v.* Queen's Proctor	2 Curt. 241	850
Aston, In re	23 Ch. D. 217	692
Attorney-General *v.* Brunning	8 H. L. C. 243	251
——— *v.* Eastlake	11 Hare, 205	780
——— *v.* Great Eastern Railway Company	L. R. 6 Ch. 572	662
——— *v.* Hope	1 C. M. & R. 530; 37 R. R. 29	251
——— *v.* Matthews	2 Lev. 167	887
——— *v.* Thames Conservators	1 H. & M. 1	275
Attwood *v.* Munnings	7 B. & C. 278; 31 R. R. 194	823
Aynsley *v.* Glover	L. R. 18 Eq. 544	307

B.

Back *v.* Stacey	2 C. & P. 465; 31 R. R. 679	311
Backhouse *v.* Wells	10 Mod. 181	36
Badische Anilin und Soda Fabrik *v.* Société Chimique	14 Rep. Pat. Cas. 875	506

		PAGE
Bagot, In re	[1893] 3 Ch. 348	515
Bahia and San Francisco Railway Company, In re	L. R. 3 Q. B. 584	588
Bailey *v.* Barnes	[1894] 1 Ch. 25	431, 605
—— *v.* Richardson	9 Hare, 734	431
Bain *v.* Fothergill	L. R. 7 H. L. 158	198
Baker, Re	79 L. T. 343	636
—— *v.* St. Marylebone Vestry	24 W. R. 848	275
Bariatinski, In re	1 Ph. 375	426
Barlow's Will, In re	36 Ch. D. 287	491
Barnhart *v.* Greenshields	9 Moo. P. C. 18	428
Barron *v.* Willis	[1900] 2 Ch. 121	767
Barton *v.* North Staffordshire Railway Company	38 Ch. D. 458	617
Batt (John) & Co. *v.* Dunnett	[1899] A. C. 428	760
Beak's Estate, In re	L. R. 13 Eq. 489	684, 889
Beckett *v.* Leeds Corporation	L. R. 7 Ch. 421	279
Beckett & Co. *v.* Addyman	9 Q. B. D. 783	736
Beddington *v.* Atlee	35 Ch. D. 317	931
Beecher *v.* Major	2 Dr. & Sm. 431	283
Beggia, In the Goods of	1 Add. 340	851
Bennett *v.* Slater	[1899] 1 Q. B. 45	138
Bentham Mills Spinning Company, In re	11 Ch. D. 900	470
Berens *v.* Fellowes	35 W. R. 356; 56 L. T. 391	643
Bernal *v.* Bernal	3 My. & Cr. 559; 45 R. R. 330	36
Berry *v.* Keen	51 L. J. (Ch.) 912	388
Besant, In re	11 Ch. D. 508	689
Betty, In re	[1899] 1 Ch. 821	714
Biddulph *v.* St. George's Vestry	3 D. J. & S. 493	275
Biederman *v.* Seymour	3 Beav. 368; 52 R. R. 155	643
Birch *v.* Joy	3 H. L. C. 565	901
Bird *v.* Wenn	33 Ch. D. 215	956
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	914
Birmingham, Dudley and District Banking Company *v.* Ross	38 Ch. D. 295	927
Blake *v.* Blake	15 Ch. D. 481	103
Bloomenthal *v.* Ford	[1897] A. C. 156	615
Boddington, In re	25 Ch. D. 685	938
Bolingbroke *v.* Hinde	25 Ch. D. 795	861
Bolton *v.* Natal Land and Colonization Company	[1892] 2 Ch. 124	359
Bonham *v.* Newcomb	1 Vern. 7, 214, 232	61
Booth *v.* Alcock	L. R. 8 Ch. 663	932
Bostock *v.* Ramsey Urban Council	[1900] 2 Q. B. 616	199
Bovill *v.* Endle	[1896] 1 Ch. 648	61
Bowden *v.* Henderson	2 Sm. & Giff. 360	725
Bowen *v.* Edwards	1 Rep. Ch. 221	71
—— *v.* Lewis	9 App. Cas. 890	36
Bower *v.* Hodges	22 L. J. (C.P.) 194	151
Box *v.* Barrett	L. R. 3 Eq. 244	515
Boyd, In re	[1897] 2 Ch. 232	252, 317
Boyes, In re	26 Ch. D. 531	215
Bradford Banking Company *v.* Briggs	12 App. Cas. 29	472
Bradford Corporation *v.* Pickles	[1895] A. C. 587	423
Bremer *v.* Freeman	10 Moo. P. C. 306	24, 855
Bridgewater Navigation Company, In re	[1891] 1 Ch. 155; 2 Ch. 317	359
Briggs and Spicer, In re	[1891] 2 Ch. 127	606

		PAGE
Brigstocke *v.* Brigstoke	8 Ch. D. 357	944
British and American Trustee and Finance Corporation *v.* Couper	[1894] A. C. 399	547
British Tanning Co. *v.* Groth	8 Rep. Pat. Cas. 113	499
Brocklesby *v.* Temperance Permanent Building Society	[1895] A. C. 173	14
Bromley *v.* Brunton	L. R. 6 Eq. 275	889
Brook *v.* Brook	9 H. L. C. 193	752
Brooke and Fremlin's Contract, In re	[1898] 1 Ch. 647	456
Brooking, In re	Marcy's Forms of Originating Summons, p. 57	845
Brookman *v.* Smith	L. R. 6 Ex. 291; 7 Ex. 271	35
Brooksbank, In re	34 Ch. D. 160	440
Broomfield *v.* Williams	[1897] 1 Ch. 602	930
Brown *v.* Cole	14 Sim. 427	61
——— *v.* Kidger	3 H. & N. 853	828
Brutton & Burney, Limited, In re	[1901] 1 Ch. 637	242
Bryant, Powis & Bryant, Limited *v.* La Banque du Peuple	[1893] A. C. 170	825
Buckley's Trusts, In re	22 Ch. D. 583	921
Budd *v.* London and North Western Railway Company	4 Ry. & Can. Cas. 393	372
Bulteel *v.* Plummer	L. R. 8 Eq. 585; 6 Ch. 160	446
Burgess *v.* Eve	L. R. 13 Eq. 450	736
Burke's Estate, In re	9 L. R. Ir. 24	792
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	472
Burland *v.* Broxburn Oil Company	42 Ch. D. 274	125
——— *v.* Earle	[1902] A. C. 83	360
Burrowes *v.* Molloy	2 J. & Lat. 521	61
Buswell's Estate, In re	5 L. R. Ir. 349	791
Byng *v.* Byng	10 H. L. C. 171	41

C.

Caddick *v.* Highton	[1901] 2 Ch. 476, n.	135
Cain *v.* Moon	[1896] 2 Q. B. 283	684, 892
Caledonian Railway Company *v.* Carmichael	L. R. 2 H. L., Sc. 56	901
Calvert *v.* Gordon	3 Man. & Ry. 124	735
Campbell *v.* Wilson	3 East, 294; 7 R. R. 462	561
Campbell's Case	L. R. 9 Ch. 1	358
Canadian Direct Meat Company, In re	W. N. (1892) 94, 146	708
Cardigan (Countess of) *v.* Curzon-Howe	9 Times L. R. 244	711
Carritt *v.* Bradley	[1901] 2 K. B. 550	71
Carter and Kenderdine's Contract, In re	[1897] 1 Ch. 776	606
——— *v.* Carter	L. R. 8 Eq. 551	84
Casborne *v.* Scarfe	1 Atk. 603	70
Cassidy *v.* Belfast Banking Company	22 L. R. Ir. 68	685
Caulfield *v.* Maguire	2 J. & Lat. 141	347
Caunt *v.* Thompson	7 C. B. 400	509
Chamberlain *v.* Napier	15 Ch. D. 614	794
Chandelor *v.* Lopus	Cro. Jac. 4; 2 Sm. L. C. 10th ed. p. 52	618
Chandler *v.* Bradley	[1897] 1 Ch. 315	600
Chaplin *v.* Leroux	5 M. & S. 14	642
Chaplin & Co. *v.* Westminster Corporation	[1901] 2 Ch. 329	275
Chawner's Settled Estates, In re	[1892] 2 Ch. 192	604

		PAGE
Cholmondeley, In re	1 C. & M. 149; 38 R. R. 601	252, 553
Christian *v.* Devereux	12 Sim. 264	180
Chudleigh's Case	1 Rep. 113 b	36
Church *v.* Brown	15 Ves. 258; 10 R. R. 74	727
City of London Brewery Company *v.* Tennant	L. R. 9 Ch. 212	306
Clark *v.* Clark	9 App. Cas. 733	247
—— *v.* Taylor	1 Drew. 642	879
Clarke *v.* Clark	L. R. 1 Ch. 16	307
—— *v.* Thornton	35 Ch. D. 307	711
Cleather *v.* Twisden	28 Ch. D. 340	826
Clement *v.* Cheesman	27 Ch. D. 631	891
Clément & Cie.'s Trade Mark, In re	[1900] 1 Ch. 114	125, 761
Clemow, In re	[1900] 2 Ch. 182	251
Clergy Society, In re	2 K. & J. 615	879
Clerk *v.* Smith	1 Salk. 241	642
Coard *v.* Holderness	20 Beav. 147	516
Coffin *v.* Cooper	2 Dr. & Sm. 365	447
Colclough, In re	8 Ir. Ch. Rep. 330	791
Cole *v.* Fitzgerald	1 S. & S. 189; 3 Russ. 301; 27 R. R. 80	719
Coles *v.* Trecothick	9 Ves. 234; 7 R. R. 167	246
Collard *v.* Hare	2 Russ. & My. 675	518
Collen *v.* Wright	7 E. & B. 301; 8 E. & B. 647	610, 613
Collinson *v.* Collinson	24 Beav. 269	103
Colliss *v.* Hector	L. R. 19 Eq. 334	794
Coltness Iron Company *v.* Black	6 App. Cas. 315	361
Colyer, In re	W. N. (1880) 131	693
Combridge *v.* Harrison	72 L. T. 592	730
Commissioners of Charitable Donations and Bequests *v.* Cotter	1 D. & War. 501	214
Coode, In the Goods of	L. R. 1 P. & M. 449	188
Coolgardie Consolidated Gold Mines, In re	76 L. T. 269	749
Cooper, In re	20 Ch. D. 611	7
—— *v.* Belsey	[1899] 1 Ch. 639	339
—— *v.* Cooper	L. R. 7 H. L. 53	442, 855
—— *v.* France	19 L. J. (Ch.) 313	643
—— *v.* Laroche	17 Ch. D. 368	545
—— *v.* Martin	L. R. 3 Ch. 47, 53	100, 107
Copland's Settlement, In re	[1900] 1 Ch. 326	714
Copp *v.* Lynch	26 Sol. J. 348	768
Corbet *v.* Waddell	7 R. 200	794
Corbishley's Trusts, In re	14 Ch. D. 846	725
Cork and Bandon Railway Company *v.* Cazenove	10 Q. B. 935	8
Cornwall *v.* Henson	[1899] 2 Ch. 710	837
Cosnahan *v.* Grice	15 Moo. P. C. 215	684
Coulthart *v.* Clementson	5 Q. B. D. 42	736
Counden *v.* Clerke	Hob. (5th ed.) 29	641
County of Gloucester Bank *v.* Rudry Merthyr Steam and House Coal Colliery Company	[1895] 1 Ch. 629	333
Courtenay *v.* Courtenay	3 J. & Lat. 519	692
Coverdale *v.* Charlton	4 Q. B. D. 104	273, 870
Cowen *v.* Truefitt, Limited	[1899] 2 Ch. 309	940
Cowley, In re	[1901] 1 Ch. 38	392
—— (Earl) *v.* Wellesley	L. R. 1 Eq. 656	944

		PAGE
Cowper *v.* Scott	3 P. Wms. 119	219
Cox and Seadon's Contract, In re	91 L. T. Jour. 241	260
—— *v.* Bishop	8 D. M. & G. 815	152
Coxon *v.* Rowland	[1894] 1 Ch. 406	315
Crampton *v.* Walker	31 L. R. Ir. 437	790
Crew *v.* Cummings	21 Q. B. D. 420	396, 699
Croker *v.* Hertford (Marquis of)	4 Moo. P. C. 339	24
Crown Bank, In re	44 Ch. D. 634	748
Crusoe *v.* Bugby	2 W. Bl. 766	729
Cummins *v.* Fletcher	14 Ch. D. 699	957
Cunynghame *v.* Thurlow	1 Russ. & My. 436, n.; 32 R. R. 242	493
Currie, In re	36 W. R. 752	460
Curtis, In re	28 L. J. (Ch.) 458	690

D.

Dalton Time Lock Company *v.* Dalton	66 L. T. 704	241
Daly *v.* Edwardes	83 L. T. 548; 18 Times L. R. 169	729
Davenport's Trust, In re	1 Sm. & Giff. 126	938
David and Matthews, In re	[1899] 1 Ch. 378	332
Davies' Trusts, In re	L. R. 13 Eq. 163	315, 553
Davis, In re	[1891] 3 Ch. 119	181
Davison *v.* Gillies	16 Ch. D. 347, n.	360
Dawes *v.* Creyke	30 Ch. D. 500	83
Deerhurst (Lord) *v.* St. Albans (Duke of)	5 Madd. 232.	811
De Fogassieras *v.* Duport	11 L. R. Ir. 123	25
D'Huart *v.* Harkness	34 Beav. 324	24
De Lusi's Trusts, In re	3 L. R. Ir. 232	315
Denaby Main Colliery Company *v.* Manchester, Sheffield and Lincolnshire Railway Company	11 App. Cas. 97	371
Denning *v.* Henderson	1 De G. & Sm. 689; 17 L. J. (Ch.) 8	194
Dennison *v.* Jeffs	[1896] 1 Ch. 611	8
Dent *v.* Auction Mart Company	L. R. 2 Eq. 238	306
—— *v.* London Tramways Company	16 Ch. D. 344	358
Derry *v.* Peek	14 App. Cas. 337	611
Deshais, In the Goods of	34 L. J. (Prob.) 58	25
De Tabley (Lord), In re	W. N. (1896) 162 (16)	19
De Teissier's Settled Estates, In re	[1893] 1 Ch. 153	15
Detillin *v.* Gale	7 Ves. 583; 6 R. R. 192	864
De Visme *v.* De Visme	1 Mac. & G. 336	230
Dickinson *v.* Dillwyn	L. R. 8 Eq. 546	85
Dickson, In re	29 Ch. D. 331	923
——— *v.* Law & Davidson	[1895] 2 Ch. 62	293, 914
——— *v.* Reuter's Telegram Company	3 C. P. D. 1	614
Didisheim *v.* London and Westminster Bank	[1900] 2 Ch. 15	491
Dillon, In re	44 Ch. D. 76	683, 889
Dix *v.* Great Western Railway Company	34 W. R. 712	911
Dobson *v.* Bowness	L. R. 5 Eq. 404	515
Dodds *v.* Dodds	11 Ir. Ch. Rep. 374	35
Doe *v.* Bramston	3 Ad. & E. 63; 42 R. R. 325	518
—— *v.* Collis	4 T. R. 294; 2 R. R. 388	36
—— *v.* Hurrell	5 B. & Al. 18; 24 R. R. 265	516
—— *v.* Jones	4 T. R. 300; 2 R. R. 390	517

		PAGE
Doe *v.* Nepean	5 B. & Ad. 86; 39 R. R. 411; 46 R. R. 789	517
—— *v.* Radcliffe	10 East, 278; 10 R. R. 295	601
—— *v.* Rouse	5 C. B. 422	938
—— *v.* Timins	1 B. & Al. 530	642
—— *v.* Vardill	5 B. & C. 438; 51 R. R. 139	855
Donald *v.* Suckling	L. R. 1 Q. B. 585	586
Dovey *v.* Cory	[1901] A. C. 477	353
Dowse *v.* Gorton	[1891] A. C. 190	343
Dowsett, In re	[1901] 1 Ch. 398	100
Doyle *v.* Coyle	[1895] 1 I. R. 205	107
Drake *v.* Attorney-General	10 Cl. & F. 257	252
Drew *v.* Norbury (Earl of)	3 J. & Lat. 267	792
Drosier *v.* Brereton	15 Beav. 221	796
Dryden *v.* Frost	3 My. & Cr. 670; 45 R. R. 344	863
Dubout & Co. *v.* Macpherson	23 Q. B. D. 340	293
Duckworth *v.* Lee	[1899] 1 I. R. 405	684
Duffield *v.* Elwes	1 Bli. (N.S.) 497; 30 R. R. 69; 1 S. & S. 239	683, 890, 893
Duncan *v.* Cannan	18 Beav. 128; 7 D. M. & G. 78	794
——— *v.* Lawson	41 Ch. D. 394	25
Dungannon (Lord) *v.* Smith	12 Cl. & F. 546	809
Dyer v. Dyer	2 Cox, 92; 1 Watk. Copy. 216; 2 R. R. 14	284
Dyke *v.* Walford	5 Moo. P. C. 434	850

E.

Earp, In re	Wolstenholme on Conveyancing and Settled Land Acts, 8th ed. p. 423	260
Eastman Photographic Materials Company *v.* Comptroller-General of Patents, Designs, and Trade Marks	[1898] A. C. 571	784
Eastman's Settled Estates, In re	W. N. (1898) 170 (15); 43 Sol. J. 114; 68 L. J. (Ch.) 122	381, 384
Easum *v.* Appleford	5 My. & Cr. 56; 51 R. R. 238	318
Ebbw Vale Steel, Iron and Coal Company, In re	4 Ch. D. 827	360
Ebrand *v.* Dancer	2 Ch. Cas. 26	285
Eccleshill Local Board, In re	13 Ch. D. 365	905
Edgington *v.* Fitzmaurice	29 Ch. D. 459	630
Edwardes *v.* Barrington	18 Times L. R. 169	729
Edwards, In re	L. R. 9 Ch. 97	84
——— *v.* Dennis	30 Ch. D. 454	758
——— *v.* Freeman	2 P. Wms. 435	220
——— *v.* Jones	1 My. & Cr. 226; 43 R. R. 178	892
——— *v.* Meyrick	2 Hare, 60	770
Edwards' Estate, In re	11 Ir. Ch. Rep. 367	63
Egmont (Earl of) *v.* Smith	6 Ch. D. 469	230
Eley, In re	37 Ch. D. 40	742
Ellesmere Brewery Company *v.* Cooper	[1896] 1 Q. B. 75	454
Elmsley *v.* Young	2 My. & K. 780	485
Empress Engineering Company, In re	16 Ch. D. 125	153
Engell *v.* Fitch	L. R. 4 Q. B. 659	195
Eno *v.* Dunn	15 App. Cas. 252	762
Enohin *v.* Wylie	10 H. L. C. 1	485, 855

		PAGE
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218	768
Evershed *v.* London and North Western Railway Company	2 Q. B. D. 254	371
Ewbank *v.* Nutting	7 C. B. 797	587
Ewin, In re	1 C. & J. 151	855
Ewing *v.* Osbaldiston	2 My. & Cr. 53	837
Exmouth (Viscount), In re	23 Ch. D. 158	539, 808
Exton *v.* Greaves	1 Vern. 138	70

F.

Fairtlough *v.* Johnstone	16 Ir. Ch. Rep. 442	203
Farman, In re	58 L. T. 12	683
Faulder & Co.'s Trade-mark, In re	18 Rep. Pat. Cas. 37	127
Fewings, Ex parte	25 Ch. D. 338	861
Field *v.* Hopkins	44 Ch. D. 524	861
Finney *v.* Grice	10 Ch. D. 13	719
Firbank's Executors *v.* Humphreys	18 Q. B. D. 54	611
Firth, Ex parte	19 Ch. D. 419	861
Fisher, In re	[1894] 1 Ch. 450	328
——— *v.* Black and White Publishing Company	[1901] 1 Ch. 174	151, 358
Fisk *v.* Attorney-General	L. R. 4 Eq. 521	881
Fitzgerald *v.* Firbank	[1897] 2 Ch. 96	729
Flack, In re	[1900] 2 Q. B. 32	417
Fleetwood, In re	15 Ch. D. 594	214
Fleming *v.* Manchester, Sheffield and Lincolnshire Railway Company	4 Q. B. D. 81	199
Fox *v.* Fox	L. R. 19 Eq. 286	945
Foxwell *v.* Van Grutten	[1897] 1 Ch. 64	388
Freer *v.* Hesse	4 D. M. & G. 495	599
Freke *v.* Carbery (Lord)	L. R. 16 Eq. 461	24
Frewen *v.* Law Life Assurance Society	[1896] 2 Ch. 511; 65 L. J. (Ch.) 787; 75 L. T. 17	203, 205, 347
Fritz *v.* Hobson	14 Ch. D. 542	273
Frost *v.* Knight	L. R. 7 Ex. 111	588
Fuller, Ex parte	16 Ch. D. 617	7
Furber, Ex parte	[1893] 2 Q. B. 122	396

G.

Gale *v.* Gale	21 Beav. 349.	103
Gard *v.* Commissioners of Sewers of the City of London	28 Ch. D. 486	168
Gardner *v.* Blane	1 Hare, 381	394
——— *v.* Parker	3 Madd. 184; 18 R. R. 213	890
Garland *v.* Beverley	9 Ch. D. 213	647, 939
Garnier, In re	L. R. 13 Eq. 532	491
Garrick *v.* Taylor	29 Beav. 79; 31 L. J. (Ch.) 68	286
Gaskell's Settled Estates, In re	[1894] 1 Ch. 485	99
Gentili, In the Goods of	Ir. R. 9 Eq. 541	28
Gentle *v.* Faulkner	[1900] 2 Q. B. 267	729
German Date Coffee Company, In re	20 Ch. D. 169	745
Giles *v.* Giles	1 Keen, 685; 44 R. R. 134	937
Gilpin's Case	Cro. Car. 161	642
Glover *v.* Weedon	3 Jur. (N.S.) 903	519

		PAGE
Goldsmid *v.* Great Eastern Railway Company	25 Ch. D. 511; 9 App. Cas. 927	561
Goodall's Trade Mark, In re	42 Ch. D. 566	134
Goodman's Trusts, In re	17 Ch. D. 266	484, 753
Goodson *v.* Richardson	L. R. 9 Ch. 221	274
Goodtitle *v.* Baldwin	11 East, 488; 11 R. R. 249	560
Goolden *v.* Thames Conservators	Unreported	168
Gordon *v.* Calvert	2 Sim. 253; 4 Russ. 581; 29 R. R. 94	735
Gossip *v.* Wright	32 L. J. (Ch.) 648	59
Gray, In re	[1896] 1 Ch. 620	466
Graysbrook *v.* Fox	1 Plowd. 275.	852
Great Western Railway Company *v.* Sutton	L. R. 4 H. L. 226	371
Greatrex *v.* Hayward	8 Ex. 291	654
Green, In re	40 Ch. D. 610	350
——— *v.* Britten	42 L. J. (Ch.) 187	205
——— *v.* Pertwee	5 Hare, 249	517
——— *v.* Pulsford	2 Beav. 70; 50 R. R. 102	601
Greenaway *v.* Adams	12 Ves. 395	731
Greening *v.* Wilkinson	1 C. & P. 625; 28 R. R. 790	587
Greetham *v.* Cotton	34 Beav. 615	78
Gregg *v.* Slater	22 Beav. 314; 2 Jur. (N.S.) 246	860
Gregory *v.* Patchett	33 Beav. 595.	365
Grey's Trusts, In re	[1892] 3 Ch. 88	484
Griffith *v.* Pound	45 Ch. D. 553	956
Grindey, In re	[1898] 2 Ch. 593	799
Guthrie *v.* Walrond	22 Ch. D. 573	205
Guthrie's Settled Estates, In re	[1902] 1 Ch. 942, n.	942
Gwatkin *v.* Bird	52 L. J. (Q.B.) 263	388

H.

Haigh *v.* West	[1893] 2 Q. B. 19	561
Halliday *v.* Holgate	L. R. 3 Ex. 299	587
——— *v.* Phillips	23 Q. B. D. 48	560
Hamilton *v.* West	10 Ir. Eq. Rep. 75	35
Hampden *v.* Buckinghamshire (Earl of)	[1893] 2 Ch. 531	89
Hampshire Land Company, In re	[1896] 2 Ch. 743	507
Handcock's Trusts, In re	23 L. R. Ir. 34	441
Hardaker *v.* Idle District Council	[1896] 1 Q. B. 335	169
Harford's Trusts, In re	13 Ch. D. 135	693
Hargreave *v.* Freeman	[1891] 3 Ch. 39	760
Harkness and Allsopp's Contract, In re	[1896] 2 Ch. 358	456
Harper *v.* Godsell	L. R. 5 Q. B. 422	823
Harrington (Countess) *v.* Harrington (Earl)	L. R. 5 H. L. 87	539, 808
Harris, In the Goods of	L. R. 2 P. & M. 83	188
Harrison, Ex parte	26 Ch. D. 522; 28 Ch. D. 363	471
———, In re	[1891] 2 Ch. 349	914
——— *v.* Southwark and Vauxhall Water Company	[1891] 2 Ch. 409	276
Harte *v.* Meredith	13 L. R. Ir. 341	218
Harvey *v.* Dougherty	56 L. T. 322	294
Haslam Company *v.* Hall	5 Rep. Pat. Cas. 1, 144; 20 Q. B. D. 491	495, 506
Haven Gold Mining Company, In re	20 Ch. D. 151	748
Hawtagne *v.* Bourne	7 M. & W. 595	828

		PAGE
Hayes, In re	[1901] 2 Ch. 529	107
——— *v.* Oatley	L. R. 14 Eq. 1	252, 553
Haynes, In re	37 Ch. D. 306	378
Heap *v.* Hartley	42 Ch. D. 461	151
Hearle *v.* Greenbank	3 Atk. 695	4
Hellmann's Will, In re	L. R. 2 Eq. 363	491
Henderson *v.* Astwood	[1894] A. C. 150	587
Hendy *v.* Stephenson	10 East, 55	560
Henry *v.* Great Northern Railway Company	1 De G. & J. 606	360
Herbert *v.* Webster	15 Ch. D. 610	543
Hereford (Bishop of) *v.* Griffin	16 Sim. 190	266
Hetling and Merton's Contract, In re	[1893] 3 Ch. 269	230
Hewitt *v.* Kaye	L. R. 6 Eq. 198	686, 889
Hickman *v.* Upsall	L. R. 20 Eq. 136	725
Higginson & Dean, In re	[1899] 1 Q. B. 325	850
Hill *v.* Cooper	[1893] 2 Q. B. 85	84
—— *v.* Hill	[1897] 1 Q. B. 483	538
Hill & Co. *v.* Hill	35 W. R. 137	951
Hoare *v.* Hoare	56 L. T. 147	879
Hobbs, In re	36 Ch. D. 553	517
Hochster *v.* De la Tour	2 E. & B. 678	588
Hockley *v.* Mawbey	1 Ves. Jr. 143; 1 R. R. 93	39
Holford *v.* Bailey	13 Q. B. 426	729
Holman *v.* Loynes	4 D. M. & G. 270	770
Holmes *v.* Blogg	8 Taunt. 508; 19 R. R. 445	7
Holyland *v.* Lewin	26 Ch. D. 266	111
Hood *v.* Barrington (Lord)	L. R. 6 Eq. 218	25
Hooper *v.* Clark	L. R. 2 Q. B. 200	730
Hopkinson *v.* Forster	L. R. 19 Eq. 74	892
Horton *v.* Bosson	80 L. T. 435	480
Hoskin's Trusts, In re	5 Ch. D. 229; 6 Ch. D. 281	252, 319, 552
Hoskins *v.* Featherstone	2 Bro. C. C. 552	402
Hotchkys, In re	32 Ch. D. 408	19, 203, 347
Houstoun, In re	1 Russ. 312	426
Howard *v.* Harris	W. & T. 7th ed. vol. ii. p. 11; 1 Vern. 190	63
——— *v.* Patent Ivory Manufacturing Company	38 Ch. D. 156	149
Howe *v.* Smith	27 Ch. D. 89	836
Howorth *v.* Sutcliffe	[1895] 2 Q. B. 358	199
Hubbard, Ex parte	17 Q. B. D. 690	586
Hughes *v.* Stubbs	1 Hare, 476	405
Hume, In re	[1895] 1 Ch. 422	845
Humphreys, In re	[1893] 3 Ch. 1	922
Hyde *v.* Hyde	L. R. 1 P. & M. 130	756

I.

Ickeringill's Estate, In re	17 Ch. D. 151	319
Imperial Hydropathic Hotel Company, Blackpool *v.* Hampson	23 Ch. D. 1	360
Ind, Coope & Co. *v.* Mee	W. N. (1895) 8	388
Ingham, In re	[1893] 1 Ch. 352	7
Inman *v.* Inman	L. R. 15 Eq. 260	6
Insole, In re	L. R. 1 Eq. 470	84
Ivimey *v.* Stocker	L. R. 1 Ch. 396	659

J.

		PAGE
Jackson, In re	21 Ch. D. 786	19
——— *v.* Normanby Brick Company	[1899] 1 Ch. 438	314
James, Ex parte	8 Ves. 337; 7 R. R. 56	246
Jaques *v.* Miller	6 Ch. D. 153	198
Jarvis (F. W.) & Co., Limited, In re	[1899] 1 Ch. 193	239
Jenkins *v.* Hutchinson	13 Q. B. 744	617
——— *v.* Jackson	[1891] 1 Ch. 89	198
Jenney *v.* Andrews	6 Madd. 264; 23 R. R. 216	252
Jennings *v.* Broughton	5 D. M. & G. 126	588
——— *v.* Jennings	[1898] 1 Ch. 378	332
——— *v.* Ward	2 Vern. 520	63
Jesson *v.* Wright	2 Bli. 1; 21 R. R. 1	36
John *v.* John	[1898] 2 Ch. 573	388
Johnson, In re	15 Ch. D. 548	344
——— *v.* Hodgson	8 East, 38	560
——— *v.* Stear	15 C. B. (N.S.) 330	588
Johnston, In re	26 Ch. D. 538	539, 808
Johnstone's Settlement, In re	14 Ch. D. 162	103
Jones, Ex parte	18 Ch. D. 109	6
—— *v.* Badley	L. R. 3 Ch. 362	406
Joplin Brewery Company, In re	W. N. (1901) 216; [1902] 1 Ch. 79	398, 695
Jordeson *v.* Sutton, Southcoates and Drypool Gas Company	[1899] 2 Ch. 217	309
Jumpsen *v.* Pitchers	13 Sim. 327	518

K.

Karberg's Case	[1892] 3 Ch. 1	707
Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	153
Kelk *v.* Pearson	L. R. 6 Ch. 809	306
Kendall *v.* Hamilton	4 App. Cas. 504	914
Kennell *v.* Abbott	4 Ves. 802; 4 R. R. 351	938
Kensington (Baron), In re	[1902] 1 Ch. 203	350
Kensit *v.* Great Eastern Railway Company	27 Ch. D. 122	653
Ker *v.* Dungannon (Lord)	1 D. & War. 509	539, 809
Kinahan & Co.'s Application, In re	10 Rep. Pat. Cas. 393	760
Kingston Cotton Mill Company (No. 2), In re	[1896] 1 Ch. 331; [1896] 2 Ch. 279	359
Knight *v.* Bowyer	2 De G. & J. 421	431

L.

Lacey, Ex parte	6 Ves. 625; 6 R. R. 9	246
Lamb *v.* Evans	[1893] 1 Ch. 218	266
Lancashire and Yorkshire Railway Company *v.* Greenwood & Son	21 Q. B. D. 217	373
Lawrence *v.* Horton	38 W. R. 555	930
Learoyd *v.* Whiteley	12 App. Cas. 727	798
Lee *v.* Neuchatel Asphalte Company	41 Ch. D. 1	152, 352
Le Farrant *v.* Spencer	1 Ves. Sen. 97	720
Levy *v.* Stogdon	[1898] 1 Ch. 478	837
Lewes' Trusts, In re	L. R. 6 Ch. 356	725
Lewis *v.* Great Western Railway Company	3 Q. B. D. 195	231

		PAGE
Lewis *v.* Nicholson	18 Q. B. 503	618
Liles *v.* Terry	[1895] 2 Q. B. 679	767
Lilly, Wilson & Co. *v.* Smales, Eeles & Co.	[1892] 1 Q. B. 456	619
Lloyd *v.* Guibert	L. R. 1 Q. B. 115	795
—— *v.* Lloyd.	3 K. & J. 20	947
Lloyd's *v.* Harper	16 Ch. D. 290	736
Lockwood *v.* Ewer	2 Atk. 303	584
London Chartered Bank of Australia *v.* Lemprière	L. R. 4 P. C. 572	553
London, Chatham and Dover Railway Company *v.* South Eastern Railway Company	[1893] A. C. 429	906
London Corporation and Tubbs' Contract, In re	[1894] 2 Ch. 524	226
Lonsdale (Earl of) *v.* Lowther	[1900] 2 Ch. 687	338
Loscombe *v.* Wintringham	13 Beav. 87	879
Low *v.* Bouverie	[1891] 3 Ch. 82	611
Lowman, In re	[1895] 2 Ch. 348	112
Lubbock *v.* British Bank of South America	[1892] 2 Ch. 198	359
Lyddon *v.* Moss	4 De G. & J. 104	771
Lyon *v.* Fishmongers' Company	1 App. Cas. 662	273
—— *v.* Knowles	3 B. & S. 556	633

M.

M'Arthur *v.* Seaforth (Lord)	2 Taunt. 257; 11 R. R. 559	588
McCheane *v.* Gyles	[1902] 1 Ch. 287	911
McCormick *v.* Grogan	L. R. 4 H. L. 82	406
M'Gonnell *v.* Murray	Ir. R. 3 Eq. 460	680
Macgowan, In re	[1891] 1 Ch. 105	742
M'Ilwraith *v.* Green	14 Q. B. D. 766	197
McIntyre Brothers *v.* McGavin	[1893] A. C. 268	661
Mackie *v.* Darling	L. R. 12 Eq. 319	491
Mackworth *v.* Hinxman	2 Keen, 658; 44 R. R. 309	539, 809
M'Myn, In re	33 Ch. D. 575	553
M'Queen *v.* Farquhar	11 Ves. 467; 8 R. R. 212	601
Maddock, In re	W. N. (1901) 118	250
——, In re	[1901] 2 Ch. 372	554
Maguire, In re	L. R. 9 Eq. 632	879
Makings *v.* Makings	1 D. F. & J. 355	350
Makins *v.* Percy Ibotson & Sons	[1891] 1 Ch. 133	333
Mandleberg *v.* Morley	12 Rep. Pat. Cas. 35	494
Manning *v.* Purcell	7 D. M. & G. 55	720
Marchant, In the Goods of	[1893] P. 254	216
Marlborough (Duke of) and Governors of Queen Anne's Bounty, In re	[1897] 1 Ch. 712	112
Marlborough (Duke of) *v.* Godolphin (Lord)	2 Ves. Sen. 61	114
Marriage, Neave & Co., In re	[1896] 2 Ch. 663	417
Marsh *v.* Attorney-General	2 J. & H. 61	880
—— *v.* Keating	1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75	616, 817
Martin, In re	57 L. T. 471	947
—— *v.* Gale	4 Ch. D. 428	6
—— *v.* Porter	5 M. & W. 351	588
—— *v.* Price	[1894] 1 Ch. 276	306

		PAGE
Maryon-Wilson, In re	[1900] 1 Ch. 565	460
Mayfair Property Company *v.* Johnston	[1894] 1 Ch. 508	275
Mead, In re	15 Ch. D. 651	890
Meeus' Application, In re	[1891] 1 Ch. 41	134
Meluish *v.* Milton	3 Ch. D. 27	937
Merry *v.* Nickalls	L. R. 7 Ch. 733; L. R. 7 H. L. 530	615
Mervin, In re	[1891] 3 Ch. 197	947
Metropolitan Electric Supply Company *v.* Ginder	[1901] 2 Ch. 799	416
Metropolitan Railway Company *v.* Defries	2 Q. B. D. 189	230
Mette *v.* Mette	1 Sw. & Tr. 416	753
Michael *v.* Hart & Co.	[1901] 2 K. B. 867; [1902] 1 K. B. 482	587
Michael's Trusts, In re	46 L. J. (Ch.) 651	543
Micklethwait *v.* Newlay Bridge Company	33 Ch. D. 133	273
Middleton, In re	19 Ch. D. 552	92
Miller *v.* Cook	L. R. 10 Eq. 641	586
—— *v.* Dell	[1891] 1 Q. B. 468	588
Mills *v.* Farmer	1 Mer. 55; 13 R. R. 247	885
Milroy *v.* Lord	4 D. F. & J. 264	284
Miner *v.* Gilmour	12 Moo. P. C. 156	649
Moet *v.* Clybouw	Seb. Dig. 316	761
—— *v.* Couston	33 Beav. 578	761
—— *v.* Pickering	8 Ch. D. 372	761
Moffett *v.* Gough (Lord)	1 L. R. Ir. 331	605
Moggridge *v.* Thackwell	7 Ves. 36; 6 R. R. 76	880
Mogridge *v.* Clapp	[1892] 3 Ch. 382	603
Montagu, In re	[1897] 2 Ch. 8	19
—— *v.* Inchiquin (Lord)	23 W. R. 592	539, 808
Montaignac *v.* Shitta	15 App. Cas. 357	827
Montgomery *v.* Foy, Morgan & Co.	[1895] 2 Q. B. 321	911
Moor *v.* Raisbeck	12 Sim. 123	116
Moore, In re	[1901] 1 Ch. 691	250, 554
—— *v.* Darton	4 De G. & Sm. 517	683
—— *v.* Dixon	15 Ch. D. 566	461
—— *v.* Greg	2 Ph. 717	157
—— *v.* Moore	L. R. 18 Eq. 474	684
—— *v.* North Western Bank	[1891] 2 Ch. 599	522
Morgan *v.* Morgan	1 Atk. 489	517
Morris, In re	33 W. R. 895	947
—— *v.* Morris	W. N. (1877) 6	372
Morritt, In re	18 Q. B. D. 222	584
Mortimer *v.* Davies	Cited 10 Ves. 363; 53 R. R. 271	284
Moser *v.* Marsden	[1892] 1 Ch. 487	914
Moses *v.* Macferlan	2 Burr. 1005	824
Mounsey *v.* Blamire	4 Russ. 384; 28 R. R. 133	642
Mumford *v.* Stohwasser	L. R. 18 Eq. 556	428
Mundy and Roper's Contract, In re	[1899] 1 Ch. 275	260
Murray, In the Goods of	[1896] P. 65	188
—— *v.* Watkins	62 L. T. 796	517
Myers *v.* Catterson	43 Ch. D. 470	931

N.

Nanney *v.* Morgan	37 Ch. D. 346	527
National Bank of England *v.* Games	31 Ch. D. 582	861

		PAGE
National Bank of Wales, In re	[1899] 2 Ch. 629; [1891] A. C. 477	353
National Telephone Company *v.* Constables of St. Peter Port	[1900] A. C. 317	870
New, In re	[1901] 2 Ch. 534	381
New Land Development Association and Gray, In re	[1892] 2 Ch. 138	600
New Zealand Gold Extraction Company *v.* Peacock	[1894] 1 Q. B. 622	748
Newbery, In re	L. R. 1 Ch. 263	689
Niboyet *v.* Niboyet	4 P. D. 1	491
Nicholson *v.* Jeyes	22 L. J. (Ch.) 833	861
Nicol's Case	29 Ch. D. 421	527, 708
Nieuwenhuys, Re	37 Sol. J. 109; 43 Sol. J. 326	260
Nixon's Estate, In re	Ir. R. 9 Eq. 7	791
Noble *v.* Cass	2 Sim. 343; 29 R. R. 115	944
Norris *v.* Beazley	2 C. P. D. 80.	914
——— *v.* Wright	14 Beav. 291.	796
North *v.* Percival	[1898] 2 Ch. 128	230
North Metropolitan Tramways Company *v.* London County Council	[1898] 2 Ch. 145	201
North-West Transportation Company *v.* Beatty	12 App. Cas. 589	533
North Western Railway Company *v.* M'Michael	5 Ex. 114	8
Northey *v.* Paxton	60 L. T. 30	719
Northumberland Avenue Hotel Company, In re	33 Ch. D. 16.	149
Norton *v.* Johnstone	30 Ch. D. 649	350
Nugent and Riley's Contract, In re	W. N. (1883) 147	957

O.

Oakbank Oil Company *v.* Crum	8 App. Cas. 65	358
O'Brien *v.* Lewis	32 L. J. (Ch.) 569	765
Oceanic Steam Navigation Company *v.* Sutherberry	16 Ch. D. 236	533
Oddy, In re	[1895] 1 Q. B. 392	30
Offord *v.* Davies	12 C. B. (N.S.) 748	736
Ogilvie *v.* Jeaffreson	2 Giff. 353	430
Oke *v.* Heath	1 Ves. Sen. 135.	115, 318
Olympia, Limited, In re	[1898] 2 Ch. 153	768
Orford (Countess of), In re	[1896] 1 Ch. 257	460
O'Toole *v.* Browne	3 E. & B. 572	515
Ottos Kopje Diamond Mines, In re	[1893] 1 Ch. 618	587
Ovey, In re	29 Ch. D. 560	878
Owen *v.* Routh.	23 L. J. (C.P.) 105	588

P.

Page, In re	[1893] 1 Ch. 304	181
—— *v.* Hayward	2 Salk. 570; Pigott on Recoveries, p. 176	36
Paget's Settled Estates, In re	30 Ch. D. 161	381
Palmer *v.* Locke	15 Ch. D. 294	446
Pares' Settled Estates, In re	Not reported	89
Parker, In re	16 Ch. D. 44.	947

		PAGE
Parker *v.* First Avenue Hotel Company.	24 Ch. D. 282	307
——— *v.* Smith	5 C. & P. 438; 38 R. R. 828	311
Parker's Trusts, In re	[1894] 1 Ch. 707	188
Parkin, In re	[1892] 3 Ch. 510	446
Parsons, In re	[1893] 2 Q. B. 122	699
Patching *v.* Barnett	51 L. J. (Ch.) 74	94
Paterson *v.* Gas Light and Coke Company	[1896] 2 Ch. 476	414
Pawley and London and Provincial Bank, In re	[1900] 1 Ch. 58	188
Pearman *v.* Pearman	33 Beav. 394	948
Pedrotti's Will, Re	27 Beav. 583	76
Peek *v.* Trinsmaran Iron Company	2 Ch. D. 115	333
Pender *v.* Lushington	6 Ch. D. 70	533
Penrhyn (Lord) *v.* Hughes	5 Ves. 99	350
Perry *v.* Meddowcroft	4 Beav. 197	62
Pertwee *v.* Townsend	[1896] 2 Q. B. 129	153
Petre *v.* Petre	14 Beav. 197	465
Petts, In re	27 Beav. 576	937
Pfleger *v.* Browne	28 Beav. 391	283
Phené's Trusts, In re	L. R. 5 Ch. 139	725
Philbrick's Settlement, In re	34 L. J. (Ch.) 368	252
——— Trusts, In re	13 W. R. 570	319, 552
Phillips *v.* Foxall	L. R. 7 Q. B. 666	737
——— *v.* Silvester	L. R. 8 Ch. 173	230
Pibus *v.* Mitford	1 Vent. 372	638
Pickering Phipps *v.* London and North Western Railway Company	[1892] 2 Q. B. 229	372
Pigot *v.* Cubley	15 C. B. (N.S.) 701	591
Pigott and Great Western Railway Company, In re	18 Ch. D. 146	905
Pinède's Settlement, In re	12 Ch. D. 667	317, 553
Platt *v.* Routh	3 Beav. 257; 52 R. R. 122	252
Player & Sons' Trade-mark, In re	[1901] 1 Ch. 382	758
Pocock and Prankerd's Contract, In re	[1896] 1 Ch. 302	338
Pole *v.* Pole	1 Dr. & Sm. 420	943
Polhill *v.* Walter	3 B. & Ad. 114; 37 R. R. 344	613
Pollard *v.* Gare	[1901] 1 Ch. 834	930
Ponsardin *v.* Peto	33 Beav. 642	761
Pontifex *v.* Midland Railway Company	3 Q. B. D. 23	199
Portland (Duke of) *v.* Bingham	1 Hagg. Cons. 157	402
Powell *v.* London and Provincial Bank	[1893] 1 Ch. 611; [1893] 2 Ch. 555	524
Powell's Trade-mark, In re	[1893] 2 Ch. 388	761
Power, In re	[1901] 2 Ch. 659	250, 554
Pratt *v.* Jackson	2 P. Wms. 302; 1 Bro. P. C. 222	719
Price, In re	[1900] 1 Ch. 442	24
——— *v.* Dewhurst	4 My. & Cr. 76; 42 R. R. 185	24
——— *v.* Perrie	Freem. Ch. 258	62
Prior *v.* Horniblow	2 Y. & C. Ex. 200; 47 R. R. 399	180

R.

Radcliffe, In re	[1892] 1 Ch. 227	493
Radnor's (Earl of) Will Trusts, In re	45 Ch. D. 402	112
Rameshur Pershad Narain Singh *v.* Koonj Behari Pattuk	4 App. Cas. 121	652

		PAGE
Randell, In re	38 Ch. D. 213	215
——— *v.* Trimen	18 C. B. 786	617
Rankin *v.* Weguelin	27 Beav. 309; 29 L. J. (Ch.) 323, n.	890, 893
Reade, In re	33 Sol. J. 219	743
Redman, In re	[1901] 2 Ch. 471	135
Reg. *v.* Chadwick	11 Q. B. 173	752
—— *v.* Thomas	7 E. & B. 399	871
Reid *v.* Rigby & Co.	[1894] 2 Q. B. 40	826
Revel *v.* Watkinson	1 Ves. Sen. 93	347
Rex *v.* Gutch	Moo. & M. 433; 31 R. R. 744	633
—— *v.* Oakley (Inhabitants)	10 East, 491	392
Rhodes, In re	36 Ch. D. 586	725
——— *v.* Bate	L. R. 1 Ch. 252	767
Rhys *v.* Dare Valley Railway Company	L. R. 19 Eq. 93	905
Rice *v.* Noakes & Co.	[1900] 1 Ch. 213; [1900] 2 Ch. 445	61
Richards *v.* Butcher	[1891] 2 Ch. 522	761
——— *v.* Kidderminster Overseers	[1896] 2 Ch. 212	418
Richardson, In re	47 L. T. 514	283
————--, In re	30 Ch. D. 396	597
————, In re	[1900] 2 Ch. 778	713
Rider *v.* Kidder	10 Ves. 360; 12 Ves. 202; 53 R. R. 269	284, 286
Ridley, In re	11 Ch. D. 645	543
Rishton *v.* Cobb	5 My. & Cr. 145; 48 R. R. 256	940
Rivett-Carnac's (Sir J.) Will, In re	30 Ch. D. 136	809
Roberts, In re	76 L. T. 479	799
——— *v.* Jones	[1891] 2 Q. B. 194	198
——— *v.* Richards	50 L. J. (Ch.) 297; 51 L. J. (Ch.) 944	662
Robinson *v.* Finlay	9 Ch. D. 487	763
——— *v.* Knight	2 Eden, 155	638
Rochdale Canal Company *v.* Radcliffe	18 Q. B. 287	560
Roe *v.* Fitzgerald	6 H. L. C. 823	36
Rodger *v.* Harrison	[1893] 1 Q. B. 161	837
Roe *v.* Grew	2 Wils. 322; Wilm. 272	36
—— *v.* Sales	1 M. & S. 297	729
Rolls *v.* St. George the Martyr, Southwark (Vestry of)	14 Ch. D. 785	870
Roots *v.* Williamson	38 Ch. D. 485	525
Roper, In re	39 Ch. D. 482	553
——-, In re	45 Ch. D. 126	94
Rose *v.* Bartlett	Cro. Car. 292	188
—— *v.* Watson	10 H. L. C. 672	837
Rowe *v.* London School Board	36 Ch. D. 619	194
Royal Bristol Permanent Building Society *v.* Bomash	35 Ch. D. 390	198
Royal Liver Friendly Society, In re	35 Ch. D. 332	138
Russell, In re	[1895] 2 Ch. 698	545
——— *v.* Briant	8 C. B. 836	633
——— *v.* Kellett	3 Sm. & Giff. 264	880
Rymer, In re	[1895] 1 Ch. 19	879

S.

Salaman *v.* Warner	[1891] 1 Q. B. 734	30
Salmon, In re	42 Ch. D. 351	293

		PAGE
Salt *v.* Northampton (Marquess of)	[1892] A. C. 1	63
Sanderson *v.* Dobson	7 C. B. 81	515
——— *v.* ———	1 Ex. 141	515
Sandwich (Earl of) *v.* Great Northern Railway Company	10 Ch. D. 707	661
Santley *v.* Wilde	[1899] 1 Ch. 747; [1899] 2 Ch. 474	60, 61
Sargent, Ex parte	L. R. 17 Eq. 273	525
Saunders, In re	[1898] 1 Ch. 17	457
Scarsdale (Lord) *v.* Curzon	1 J. & H. 40	541, 809
Scott *v.* Bentley	1 K. & J. 281	491
——— *v.* Scott	1 Eden, 458	642
Scriven *v.* Scriven	2 J. & H. 743	318
Seton *v.* Slade	7 Ves. 265; 6 R. R. 124	71
Severn and Wye and Severn Bridge Railway Company, In re	[1896] 1 Ch. 559	360
Shannon *v.* Bradstreet	1 Sch. & Lef. 52; 9 R. R. 11	943
Sharpe, In re	[1892] 1 Ch. 154	360
Sharshaw *v.* Gibbs	Kay, 333	350
Shaw, In re	[1895] 1 Ch. 343	461
——— and Birmingham Corporation, In re	27 Ch. D. 614	906
——— *v.* Hertfordshire County Council	[1899] 2 Q. B. 282	200
Sheffield *v.* London Joint Stock Bank	13 App. Cas. 333	525
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	306
Shelley *v.* Shelley	L. R. 6 Eq. 540	539, 809
Shelley's Case	1 Rep. 93 b; Tudor's Real Property Cases, 4th ed. p. 332	35, 41
Shepherd's Case	L. R. 2 Eq. 564; 2 Ch. 16	527
Sherry, In re	25 Ch. D. 692	737
Sherwin *v.* Shakspear	5 D. M. & G. 517	198, 230
Shropshire Union Railways and Canal Company *v.* Reg.	L. R. 7 H. L. 496	527
Silvester, In re	[1895] 1 Ch. 573	737
Simpson *v.* Westminster Palace Hotel Company	8 H. L. C. 712	[illegible]3
Slevin, In re	[1891] 2 Ch. 236	879
Slim *v.* Croucher	1 D. F. & J. 518	618
Smith, In re	[1899] 1 Ch. 331	381
———, In re	[1893] 1 Q. B. 323	417
——— *v.* Davies	31 Ch. D. 595	30
——— *v.* Hancock	[1894] 2 Ch. 377	950
——— *v.* Kemp	2 Salk. 637	730
Smithwick *v.* Smithwick	12 Ir. Ch. Rep. 181	790
Smokeless Powder Company's Trade-mark, In re	[1892] 1 Ch. 590	125
Smout *v.* Ilbery	10 M. & W. 1	617
Société Générale de Paris *v.* Walker	11 App. Cas. 20	522
Somerset, In re	[1894] 1 Ch. 231	798
Sottomaior, In re	L. R. 9 Ch. 677	426
Sottomayor *v.* De Barros	3 P. D. 1; 5 P. D. 94	491, 753, 756
Southern *v.* Wollaston	16 Beav. 166	948
Speight *v.* Gaunt	9 App. Cas. 1	799
Speller & Co. *v.* Bristol Steam Navigation Company	13 Q. B. D. 96	293
Spencer's Trade-mark, In re	3 Rep. Pat. Cas. 73	758
Spiral Globe, Limited, In re	[1902] 1 Ch. 396	697
Spurgeon *v.* Collier	1 Eden, 55	71
Stamford's (Lord) Settled Estates, In re	43 Ch. D. 84	711

		PAGE
Stevens *v.* Van Voorst	17 Beav. 305	85
Stewart *v.* Stewart	15 Ch. D. 539	219
Stikeman *v.* Dawson	1 De G. & Sm. 90	6
Strachy *v.* Francis	2 Atk. 217	402
Strickland *v.* Strickland	10 Sim. 374; 51 R. R. 270	643
Stuart, In re	[1897] 2 Ch. 583	798
Suffell *v.* Bank of England	9 Q. B. D. 555	527, 453
Sutcliffe *v.* Booth	32 L. J. (Q.B.) 136	649
Sutherland (Dowager Duchess) *v.* Sutherland (Duke)	[1893] 3 Ch. 169	603
Swaffield *v.* Nelson	W. N. (1876) 255	796
Swain, In re	[1891] 3 Ch. 233	180
Swaine *v.* Burton	15 Ves. 365	642
Swansborough *v.* Coventry	2 Moo. & S. 362; 35 R. R. 660	933
Swansea Shipping Company *v.* Duncan, Fox & Co.	1 Q. B. D. 644	293
Sweet *v.* Benning	16 C. B. 459	266
Swindon Waterworks Company *v.* Wilts and Berks Canal Navigation Company	L. R. 7 H. L. 697	661
Swinfen *v.* Swinfen	29 Beav. 207.	719
Syer *v.* Gladstone	30 Ch. D. 614; [1902] 1 Ch. 211, n.	203, 350

T.

Talbot *v.* Radnor (Earl)	3 My. & K. 252; 41 R. R. 64	203
Tamplin's Case.	W. N. (1892) 94, 146	708
Teevan *v.* Smith	20 Ch. D. 724	59
Tewart *v.* Lawson	L. R. 18 Eq. 490	350
Thacker *v.* Key	L. R. 8 Eq. 408	446
Thames Conservators *v.* Smeed, Dean & Co.	[1897] 2 Q. B. 334	168
Thomas, In re	[1900] 1 Ch. 319	713
——— *v.* Thomas	2 K. & J. 79	517
Thomas Hubbuck & Son, Limited *v.* William Brown, Sons & Co.	17 Rep. Pat. Cas. 638	761
Thurston, In re	32 Ch. D. 508	318
Tollemache *v.* Coventry (Earl of)	2 Cl. & F. 611; 37 R. R. 260	539, 807
Tomkyns *v.* Blane	28 Beav. 422	440
Tonbridge Wells Corporation *v.* Baird	[1896] A. C. 434	273
Toomes *v.* Conset	3 Atk. 261	70
Touche *v.* Metropolitan Railway Warehousing Company	L. R. 6 Ch. 671	152
Townshend (Lord) *v.* Windham	2 Ves. Sen. 1	252
Towse *v.* Loveridge	25 Ch. D. 76	913
Tracy *v.* Hereford (Viscountess of)	2 Bro. C. C. 128	347
Treasure, In re.	[1900] 2 Ch. 648	250, 554
Trollope *v.* Routledge	1 De G. & Sm. 662	461
Tucker *v.* Wilson	1 P. Wms. 261; 5 Bro. P. C. 193	583
Tucker's Settled Estates, In re	[1895] 2 Ch. 468	713
Tulk *v.* Moxhay	2 Ph. 774	151
Tunbridge Wells Corporation *v.* Baird	[1896] A. C. 434	869
Turner, In re	[1897] 1 Ch. 536	799
——— *v.* Brittain	3 N. R. 21	937
Turner's Estate, Re	10 W. R. 128	331

		PAGE
Turney, In re	[1899] 2 Ch. 739	947
Tyrrell *v.* Bank of London	10 H. L. C. 26	767

V.

Vachell *v.* Jeffereys	Prec. Ch. 170	219
Van Grutten *v.* Foxwell	[1897] A. C. 658	36
Vaughan *v.* Burslem	3 Bro. C. C. 101	539
——— *v.* Vanderstegen	2 Drew. 165	553
Veal *v.* Veal	27 Beav. 303	890
Verner *v.* General and Commercial Investment Trust	[1894] 2 Ch. 239	152, 353
Vernon *v.* St. James' Vestry	16 Ch. D. 449	272

W.

Waite *v.* Morland	38 Ch. D. 135	83
Walker, In re	L. R. 7 Ch. 120	724
Wall *v.* Stanwick	34 Ch. D. 763	517
Walter *v.* Howe	17 Ch. D. 708	266
Walton *v.* Walton	14 Ves. 318	219
Wandsworth Board of Works *v.* United Telephone Company	13 Q. B. D. 904	866
Ward *v.* Turner	2 Ves. Sen. 431	683
Waring *v.* Coventry	2 My. & K. 406; 39 R. R. 230	350
——— *v.* Waring	3 Ir. Ch. Rep. 331	792
Warren *v.* Brown	[1900] 2 Q. B. 722; [1902] 1 K. B. 15	305
Warren's Trusts, In re	26 Ch. D. 208	436
Watson, In re	35 W. R. 711	25
——— *v.* England	14 Sim. 28	725
——— *v.* Hayes	5 My. & Cr. 125; 48 R. R. 249	947
Watts *v.* Fraser	7 C. & P. 369	633
Wayn *v.* Lewis	1 Drew. 487	585
Webber *v.* Lee	9 Q. B. D. 315	730
Weeks *v.* Propert	L. R. 8 C. P. 427	614
Wells, In re	43 Ch. D. 281	921
Wells' Trusts, In re	42 Ch. D. 646	107
Werderman *v.* Société Générale d'Électricité	19 Ch. D. 246	147
Wheatley, In re	27 Ch. D. 606	441
Wheeldon *v.* Burrows	12 Ch. D. 31	930
Wheeler *v.* Sheer	Mos. 289 (288 and 301 Fol. Ed.)	219
Wheelwright *v.* Walker	23 Ch. D. 752	259
Whelan, In re	[1897] 1 I. R. 575	737
Whistler *v.* Webster	2 Ves. Jr. 367; 2 R. R. 260	440
Whitchurch *v.* Whitchurch	2 P. Wms. 236; 1 Str. 619; Gilb. Eq. Rep. 168	25
White, In re	[1893] 2 Ch. 41	215
White's Charities, In re	[1898] 1 Ch. 659	273
——— Trusts, In re	33 Ch. D. 449	880
Whitehead & Brothers, In re	[1900] 1 Ch. 804	239
Whitley *v.* Challis	[1892] 1 Ch. 64	333, 954
Wild's Case	6 Rep. 16 b; Tudor's Real Property Cases, 4th ed. p. 361	41

		PAGE
Wilday *v.* Barnett	L. R. 6 Eq. 193	252
Wilkinson, In re	L. R. 4 Ch. 587	252
——— *v.* Atkinson	T. & R. 255	219
——— *v.* Joughin	L. R. 2 Eq. 319	937
Willett *v.* Finlay	29 L. R. Ir. 156, 497	121
——— *v.* Winnell	1 Vern. 488	62
Williams *v.* Arkle	L. R. 7 H. L. 606	219
——— *v.* Pott	L. R. 12 Eq. 149	518
Willoughby Osborne *v.* Holyoake	22 Ch. D. 238	319
Wilmer *v.* McNamara & Co.	[1895] 2 Ch. 245	359
Wilson *v.* Church	9 Ch. D. 552	915
——— *v.* Sewell	1 W. Bl. 617	942
——— *v.* Tooker	5 Bro. P. C. 193	583
——— *v.* Wilson	28 L. J. (Ch.) 95; 4 Jur. (N.S.) 1076	545
Wilsons and Stevens' Contract, In re	[1894] 3 Ch. 546	230
Wilts and Berks Canal Navigation Company *v.* Swindon Waterworks Company	L. R. 9 Ch. 451	661
Wintle, In re	[1896] 2 Ch. 711	947
Wollaston *v.* King	L. R. 8 Eq. 165	441
Wood *v.* Leadbitter	13 M. & W. 838	730
——— *v.* Waud	3 Ex. 748	654
Woods and Lewis' Contract, In re	[1898] 1 Ch. 433; [1898] 2 Ch. 211	230
Woolridge *v.* Woolridge	Joh. 63	440
Worms *v.* De Valdor	28 W. R. 346; 49 L. J. (Ch.) 261	488
Worthington *v.* Curtis	1 Ch. D. 419	284
Wyatt *v.* Cook	W. N. (1868) 237; L. J. N. of C. (1868) 75, 217	860, 861
Wythes *v.* Lee	3 Drew. 396	837

X.

X., In re	[1899] 1 Ch. 526	690

Y.

Yates *v.* Jack	L. R. 1 Ch. 295	307
Young and Harston's Contract, In re	31 Ch. D. 168	226
Young & Co. *v.* Bankier Distillery Company	[1893] A. C. 691	661

Z.

Zouch *v.* Parsons	3 Burr. 1794	4

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

THURSTAN *v.* NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

C. A. 1901 *Nov.* 7; *Dec.* 2.

[1900 T. 606.]

Building Society—Infant Member—Power to Mortgage for Advances—Purchase of Land by Infant—Purchase-money paid by Building Society—Lien for Purchase-money—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 14, 15, 21, 38—*Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

Notwithstanding s. 38 of the Building Societies Act, 1874, which provides that an infant may be admitted as a member of a building society the rules of which do not prohibit such an admission, "and may give all necessary acquittances," an infant member of a building society registered under that Act cannot execute a valid mortgage of his real estate to secure advances made to him by the society. Such a mortgage is absolutely void as against the infant under the Infants Relief Act, 1874.

An infant member of a building society purchased land, part of the purchase-money being paid for her by the society to the vendor. The land was conveyed to her on July 21, and the next day she executed a mortgage of it to the society to secure advances by them. She did not represent to the society that she was of full age, but they were in fact then ignorant that she was an infant. After the execution of the mortgage the society from time to time made advances to her which were applied in erecting buildings on the land. In October the society discovered for the first time that the mortgagor was an infant. They then discontinued making advances to her, took possession of the property and expended money in completing the houses on it. When the infant attained twenty-one

C. A.
1901
THURSTAN
v.
NOTTINGHAM
PERMANENT
BENEFIT
BUILDING
SOCIETY.

she brought an action against the society to set aside the mortgage as being void against her, and claiming possession of the land and delivery up of the title-deeds.

Joyce J. dismissed the action, on the ground that the purchase and the mortgage formed really one transaction, and that the plaintiff could not repudiate one part of the transaction while retaining the benefit of the other part :—

Held, by the Court of Appeal, that the purchase and the mortgage were two distinct transactions, and that the mortgage was absolutely void as against the plaintiff, and must be delivered up to be cancelled :

But, *held*, that the building society were entitled to a lien upon the property and the title-deeds for the purchase-money which they had paid for the plaintiff to the vendor, with interest thereon.

APPEAL against the decision of Joyce J. (1)

The action was brought by a married woman, suing in respect of her separate estate, to set aside a mortgage which she had executed to the defendant society when she was an infant.

In June, 1898, the plaintiff, then a married woman, but under the age of twenty-one, was on her application duly admitted a member of the defendant society, who were registered under the Building Societies Act, 1874. Early in July, 1898, she applied on the forms of the society for a loan of 1200*l.*, to enable her to purchase some freehold land, and to complete six houses then in course of erection on the land by her husband, who was a builder. The application was granted, and the transaction was carried out by two deeds dated respectively July 21 and 22, 1898. By the deed of July 21 the land was conveyed to the plaintiff in fee simple in consideration of 393*l.* expressed to be paid by her to the vendor out of her separate estate. By the deed of July 22 (in the usual form of a mortgage to a building society) the plaintiff mortgaged the property to the defendant society as security for advances up to 1200*l.*, to be made by them to her, which were to be repaid by monthly instalments. The sum of 250*l.*, part of the purchase-money of the property, was paid by the defendants on behalf of the plaintiff to the vendor. They from time to time after the execution of the mortgage made further advances to her.

In October, 1898, the society heard for the first time that

(1) [1901] 1 Ch. 88.

the plaintiff was a minor. Thereupon they discontinued their advances, took possession of the property, and expended about 268*l.* in completing the buildings, which they then let, and collected the rents. At the time when the society took possession the amount due to them for advances under the mortgage was 1070*l.*, of which 250*l.* had been applied in the purchase of the property, and the balance had been expended on the buildings.

In March, 1899, the plaintiff attained her majority, and shortly afterwards she by her solicitor applied to the society claiming the property and repudiating the mortgage. The society declined to give up possession; and in April, 1899, the plaintiff commenced this action, claiming a declaration that the mortgage was void, and that she was entitled to an order for its delivery up to be cancelled, and for delivery of the title-deeds and possession of the property.

The society by their defence claimed a lien or charge on the property for all their advances, and offered to deliver up possession of it and the title-deeds on payment of what was due to them.

At the trial it was admitted that the total amount due to the society, after allowing for rents received by them, was about 1300*l.*, and that the then present value of the property was about 1800*l.*

Under the certified rules of the society it was competent for a minor to become a member.

Joyce J. held that the purchase and the mortgage formed one transaction, and that the plaintiff could not repudiate one part of the transaction while affirming and taking the benefit of the other part. His Lordship held, therefore, that the plaintiff was not entitled to the property free from the charge of the building society for the money which they had advanced, and he dismissed the action.

The plaintiff appealed.

Badcock, K.C., and *Edward Ford*, for the plaintiff. It is admitted that the plaintiff has not acted fraudulently or dishonestly in the transaction in question. Her object in bringing

C. A. 1901

THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

this action is that all her creditors may share equally, instead of the defendants obtaining a preference.

It is submitted that an infant member of a building society stands for the present purpose in no better position than any other infant.

It is well-settled law that an infant can "by no manner of conveyance dispose of his inheritance": *Hearle* v. *Greenbank* (1), per Lord Hardwicke L.C. And s. 1 (2) of the Infants Relief Act, 1874, expressly makes absolutely void all contracts "entered into by infants for the repayment of money lent or to be lent." The mortgage to the society is either void or voidable, and, if it is only voidable, the plaintiff has done all that is necessary to repudiate it since she came of age.

[ROMER L.J. According to Simpson on Infants, 2nd ed. p. 7, an infant's deed is only voidable.

COZENS-HARDY L.J. And so Mansfield C.J. said in *Zouch* v. *Parsons*. (3)]

The plaintiff stands upon her legal rights; she is seeking to establish her title to the land, to obtain possession of it and of the title-deeds. She is not seeking to enforce any equitable right. The learned judge said that the conveyance to the plaintiff and the mortgage were all one transaction, and that the plaintiff could not repudiate one part and at the same time retain the benefit of the other part. It is submitted that there were two distinct transactions. The only recital in the mortgage deed is that the mortgagor is "seised in fee" of the land. The deed is in the usual form of a mortgage to a building society. It is not as if the society had conveyed the land to the plaintiff, and she had then mortgaged it to them. And, if the plaintiff did repudiate the conveyance to herself, the defendants would have no legal estate.

(1) (1749) 3 Atk. 695, 712.

(2) Sect. 1: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

(3) (1765) 3 Burr. 1794, 1804.

The payment of the 250*l.* by the society to the vendor of the land cannot entitle them to recover the advances which they made to the plaintiff subsequently.

[VAUGHAN WILLIAMS L.J. Could the plaintiff maintain an action of trover for the title-deeds without repaying the 250*l.* to the society?]

If that is all the relief sought, the plaintiff does not object to repaying that sum.

The defendants have not acquired the legal estate from the plaintiff: it remains in her, and they have no equity to compel her to convey it to them.

The Building Societies Act, 1874, does not by s. 38 (1)

(1) By s. 13 of the Act, "Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage; and any society under this Act shall, so far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Provided always, that any land to which any such society may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, shall as soon afterwards as may be conveniently practicable be sold or converted into money."

Sect. 14: "The liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share, and in respect of any share upon which an advance has been made shall be limited to the amount payable thereon under any mortgage or other security or under the rules of the society."

Sect. 15: "(1.) Any society under this Act may receive deposits or loans, at interest, within the limits in this section provided, from the members or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society."

Sect. 21: "The rules of a society under this Act shall be binding on the several members and officers of the society, and on all persons claiming on account of a member, or under the rules, all of whom shall be deemed and taken to have full notice thereof."

Sect. 38: "Any person under the age of twenty-one years may be admitted as a member of any society under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances; but during his nonage he shall not be competent to vote or hold any office in the society."

C. A. 1901 THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

empower an infant member of a building society to execute a mortgage of his real estate to the society. The words "may give all necessary acquittances" do not confer expressly or by implication a power to mortgage. Sect. 38 does not apply to a borrowing member; it applies only to a member who is making an advance to the society. It does not follow that a member who applies for an advance will obtain one, or will even have an opportunity of doing so. Advances are balloted for. A member of the society is equally a member, even if he does not require an advance. Advances are to be made on security, and this implies that the borrower is capable of giving a security.

[VAUGHAN WILLIAMS L.J. Can an infant member be sued for subscriptions or fines?]

The remedy of the society for non-payment is by forfeiture of his shares.

In other statutes, when the Legislature intended to confer on an infant such a power, they did so in express words. For instance, in s. 9 of the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), it is provided that an infant member of a trade union may "execute all instruments and give all acquittances necessary to be executed or given under the rules." Similar words occur in s. 11, sub-s. 9, of the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), and in s. 15, sub-s. 8, of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60).

There can be no fraud without an express representation by the infant that she was of full age: *Ex parte Jones* (1); *Stikeman* v. *Dawson* (2); and the plaintiff did not make such a representation. Indeed, fraud is not alleged against her. In *Martin* v. *Gale* (3) money had been advanced to an infant for necessaries, and yet it was held that an assignment by him of his reversionary interest in stock to the lender did not bind the infant. In *Inman* v. *Inman* (4), an infant, when he charged his reversionary interest in a fund as security for an advance made to him, falsely represented that he was of full age, and yet it

(1) (1881) 18 Ch. D. 109.
(2) (1847) 1 De G. & Sm. 90.
(3) (1876) 4 Ch. D. 428.
(4) (1873) L. R. 15 Eq. 260.

was held that the charge was avoided by a mortgage of the fund made by him after he attained full age, the mortgagee having had no notice of the prior charge.

No doubt the Court could on behalf of the infant have affirmed the mortgage, but it has not done so. The plaintiff has never parted with the legal estate in the property, and the defendants cannot indirectly acquire a lien upon it. A man who is not rightly in possession of property cannot acquire a lien upon it: *Ex parte Fuller*. (1) In the present case the defendants entered into possession before default by the plaintiff. No doubt it has been held that an infant, having with his own hand paid money on a valuable consideration, which he has only partially enjoyed, cannot recover the money: *Holmes* v. *Blogg*. (2) Here the defendants obtained the title-deeds from the vendor because they paid the purchase-money. The fact that they did this under the authority of the plaintiff cannot make her liable.

[VAUGHAN WILLIAMS L.J. If the defendants obtained the deeds from the vendor, what right would they have to give them up to the plaintiff?]

She has the legal estate, and is, therefore, entitled to the deeds. An infant in the view of the law can have no will, and could not, therefore, voluntarily part with the deeds. The legal disability of an infant cannot be removed by a side wind. The Court has jurisdiction to order the delivery of title-deeds to the legal owner: *In re Cooper* (3); *In re Ingham*. (4)

Hughes, K.C., and *G. Broke Freeman*, for the defendants. It is submitted that the decision of Joyce J. was right, both on the ground on which he based it and upon the construction of the Building Societies Act, 1874.

The purchase and the mortgage were really one transaction; the purchase-money was paid directly by the defendants to the vendor. The plaintiff never had any interest in the land but an equity of redemption, i.e., an interest subject to a charge for the money which was advanced by the defendants. The plaintiff is endeavouring to keep the houses, though

(1) (1881) 16 Ch. D. 617.
(2) (1818) 8 Taunt. 508; 19 R. R. 445.
(3) (1882) 20 Ch. D. 611.
(4) [1893] 1 Ch. 352.

C. A. 1901

THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

the defendants supplied the money for the cost of building them. The defendants acquired a lien which extends to the advances which they made subsequently to the date of the deed. The money was employed in increasing the value of the land. An infant cannot resist an action for calls upon shares while he retains the shares: *Cork and Bandon Ry. Co.* v. *Cazenove* (1); *North Western Ry. Co.* v. *M'Michael.* (2)

As to the construction of the Building Societies Act, 1874, it is submitted that a mortgage by an infant member for the purposes pointed out in the Act is valid. One of the main objects of a building society is to enable advances for building purposes to be made to the members. The objects of the defendant society are similarly stated in their rules. Sect. 38 gives an infant member power to do whatever a member would naturally do under the provisions of the Act. The terms of a mortgage to the society are not a matter of bargain in each case; they are fixed by the rules, and thus an infant is protected. If an infant cannot give an effectual security, it follows that he cannot obtain an advance at all.

[ROMER L.J. He might be able to procure some one who would give security for him, e.g., his father.]

The Act contemplates that a member shall mortgage his own property to the society as security for an advance. *Dennison* v. *Jeffs* (3) is directly in point. There it was held by North J. that "an infant member of a building society can consent to the dissolution of the society." The rights and obligations of an infant member are the same as those of any other member, unless in any case the Act contains an express provision to the contrary. An infant can do everything which is incident to the position of a member, unless there is an express exception.

Badcock, K.C., in reply. It is desirable that infants should be protected against themselves. There is no reason why an infant should enter into a building speculation. The Building Societies Act does not say that an infant member shall have all the powers of a member.

Cur. adv. vult.

(1) (1847) 10 Q. B. 935, 939. (2) (1850) 5 Ex. 114.
(3) [1896] 1 Ch. 611.

Dec. 2. VAUGHAN WILLIAMS L.J. read the following judgment:—I cannot agree with the conclusion at which Joyce J. has arrived in its entirety. I think that the mortgage deed is void and not binding on the plaintiff. It seems clearly to come within s. 1 of the Infants Relief Act, 1874, as being a contract "for the repayment of money lent"; and I cannot regard the transaction of the purchase of the land and the advance of the money for building as all one transaction. The transaction of the purchase was a transaction between the vendor and Mrs. Thurstan, whereas the transaction of the advance of the money was between the building society and Mrs. Thurstan. The former transaction was voidable, and Mrs. Thurstan has affirmed it. The latter was void, so far as the contract to repay is concerned. I think that the advances of money for building stand on a different footing from the 250*l.* paid by the building society for the purchase of the land and the expenses of conveyance. The money advanced for building was simply money lent, and the society has no security except the mortgage, which, in my judgment, is void as a contract for the repayment of money lent; whereas in the transaction of purchase the society acted as the agents of Mrs. Thurstan to carry through the purchase for her, by paying the purchase-money and obtaining a conveyance to her. In my opinion, Mrs. Thurstan could not adopt the act of her agents, and claim to have the title-deeds and conveyance handed over to her by the building society, without repaying to them the purchase-money which they paid to obtain the conveyance; and I think that, without any contract to that effect, the society have a lien or charge on the title-deeds and conveyance for the money which they paid to obtain the property, which Mrs. Thurstan now claims. If Mrs. Thurstan adopts the acts done by the society, she must discharge the cost and indemnify the society against the same.

I thought during the argument that the only security which the building society held for the 250*l.* which they had paid for purchase-money was a lien upon and a right to retain the title-deeds and conveyance until the money had been repaid; but I am satisfied now, after discussing the matter with my brethren, that the society, having paid off the vendor, have a

C. A. 1901 THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY. Vaughan Williams L.J.

right to the remedies of the vendor—have a right, that is, to enforce the vendor's lien. It is true that the society were not the vendors, but, having paid off the vendor, the society, as against the purchaser, stand in the place of the vendor. It follows, in my judgment, that the plaintiff is entitled to a declaration that the mortgage deed is void and not binding on her, and is entitled to delivery up of the same and to have it cancelled, but is not entitled to have the title-deeds given up discharged from any lien or charge of the society, unless and until she pays to the society the purchase-money which they paid for the land. I think, moreover, that the society are entitled to a declaration that they have a lien or charge on the land for the amount of the purchase-money and expenses, and that, so far as is necessary, the plaintiff is a trustee for them of the land conveyed to her.

The only other matter with which I have to deal is an argument put forward on behalf of the defendants that s. 38 of the Building Societies Act, 1874, which enables minors to become members of these societies, validates contracts by them to repay moneys which are lent to them by the society. I cannot agree. On this point I take the same view as Joyce J. The section only validates the contract of membership. Borrowing money is not a necessary consequence of membership. In fact, the majority of members do not borrow of the society. The society can only make advances on the security of a land mortgage; and I think it would be straining s. 38 very much to hold that it authorizes an infant to raise money on mortgage of his land.

It only remains to deal with the costs. I think each party should bear his own costs of this appeal and in the Court below. The exact form of the judgment will be stated by Romer L.J.

ROMER L.J. read the following judgment:—The first question is, whether the Building Societies Act of 1874 enables a minor, by becoming a member of a building society, to borrow money by means of advances on mortgage of his property. I do not think it does. As pointed out by my Lord, though the

Act enables a minor to become a member, it has not in terms authorized his borrowing while under twenty-one years of age, and it is not a necessary part of a member's position that he should have advances or mortgage his property. Many members never want advances, and many others, even if they desired advances, could not obtain them, by reason of their having no sufficient property to give as security. A minor, who cannot legally contract for a loan, or mortgage his estates, is in no worse position than the members I have last mentioned. And to hold that the Building Societies Act has given a minor general power in the shape of advances to borrow, and to mortgage his estates, would practically to a great extent destroy the protection intended to be given to infants by the Infants Relief Act, 1874. A building society is not bound to see to the application of its advances by the members advanced. All it need look to is the sufficiency of the security. And, if the Building Societies Act authorized any infant to take advances, and mortgage his or her estates for the amount advanced, then every infant with an estate might borrow to the extent of that estate as a security, by merely joining a building society. I do not think the Building Societies Act has authorized this, or has the effect contended for by the defendant society.

The case then has to be considered according to the ordinary principles regulating dealings by infants. Now, to the extent to which the money advanced by the defendant society went to complete the purchase by the plaintiff, I agree with Joyce J. in thinking that the plaintiff cannot affirm the purchase and repudiate the advance. But for that advance the vendor would have had a vendor's lien on the estate purchased for the amount of the purchase-money, and to that extent I think the defendant society can stand in the shoes of the vendor.

But beyond this I do not think we can go with the judgment of the Court below. To my mind, it is impossible to treat the advances which were made subsequent to the completion of the purchase as forming one transaction with the purchase, and I think these advances cannot be treated as binding the

C. A. 1901

THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

Romer L.J.

infant on the ground adopted by Joyce J. Nor can the mortgage be held on that ground to bind the plaintiff.

At first I was inclined to think that some other good ground might be found by which the advances, as binding the estate, and the deed of mortgage might be supported, at any rate, to some extent. But I have been unable to find any such ground. The Infants Relief Act, 1874, is too strong. No doubt the result will be a great hardship on the defendant society, but the Legislature thought it necessary, for the benefit of the community at large, to provide that all contracts by infants for the repayment of money lent should be absolutely void. If this results in a hardship to an individual lender, it cannot be helped. He must suffer for the public good. Of course, different considerations would arise if the infant had been guilty of fraud. But here no charge of fraud is made. The plaintiff did not represent or induce the building society to believe that she was of full age.

On what other ground then can the Court hold that a contract which is void gives the lender a charge on the borrower's land? I know of none. Even if the borrower had, as a matter of fact, and for his own purposes only, used the money to buy some chattels or lands, the lender could not have claimed those chattels or lands, or any charge on them. And, if the borrower had chosen to spend the money in building on his land, that fact, in itself, would not give the lender a charge on the land.

It occurred to me that, as the building society in this case advanced its money by instalments to the infant in order to pay her builder, and, inasmuch as the contract to build, as between the infant and the builder, was not one of loan, and might not be void under the statute as a contract for goods supplied, the building society might stand in the shoes of the builder. But, even if that were the case, it would not help the society in this case, for the builder had no lien or charge on the land in respect of the building work done.

Lastly, it was suggested on behalf of the building society that, inasmuch as it has a charge on the plaintiff's land for the sum paid by them on completion of her purchase to the vendor, the

plaintiff, being obliged to redeem the land from that charge, is bound to do equity, and that it would not be equity to allow the plaintiff to redeem without paying the moneys subsequently advanced by the society, at any rate to the extent to which the land has been benefited by those moneys. But the short answer is, that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void. It follows that there must be a declaration that the mortgage is void as against the plaintiff, and the mortgage deed should be cancelled.

But it should also be declared that the society was, at the date of the completion of the purchase, entitled to a charge for the limited sum above mentioned, with interest thereon at 4 per cent., and was entitled to retain the title-deeds accordingly. I agree with my Lord in thinking that there should be no costs. The defendant society, having only an equitable charge, was not entitled to take possession of the mortgaged property. The proper remedy of the society was to obtain a receiver. But I do not think it would be right to insist on the plaintiff being at once let into possession, as the defendant society ought to have time to consider its position, and to apply for a receiver if so advised. There should, therefore, only be liberty reserved for the plaintiff to apply for possession. No further relief can be granted in this action.

COZENS-HARDY L.J. read his judgment as follows:—I agree, and I have very little to add. Two contracts have to be considered. The first was a contract for the purchase of the land. This was voidable only, and not void, and has been adopted and confirmed by the plaintiff since she attained twenty-one. Under this contract, and as a legal consequence of it, there arose a vendor's lien for unpaid purchase-money.

The second was a contract for the repayment of money lent and to be lent. This was absolutely void under the statute of 1874, and not capable of confirmation. The defendants are in no better position, and they ought not to be in a worse position, than if the plaintiff had been adult, but the mortgage deed

C. A. 1901

THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

were proved to be forged. Even in that case the defendants would be entitled to stand in the shoes of the vendor to the extent to which their money discharged the vendor's lien: see *Brocklesby* v. *Temperance Permanent Building Society*. (1) The result is that we must declare that the defendants had a charge for the amount paid by them to the vendor, with interest at 4 per cent.

The formal order to be made was stated by Romer L.J. in substance as follows:—

DECLARATION.

Declare that the mortgage deed is void as against the plaintiff, and order the defendant society to deliver it up to the plaintiff to be cancelled. Declare that the defendant society became entitled on July 21, 1898, to an equitable charge on the land and premises purchased by the plaintiff and conveyed to her by the deed of July 21, 1898, to secure so much money as was paid by the defendant society in or towards payment of the purchase-money payable by the plaintiff for the land and premises, with interest at 4 per cent. per annum. Liberty to the plaintiff to apply as to possession of the land and premises. No order as to costs. The judgment in the Court below should be discharged.

Upon the application of the defendants' counsel

THE COURT gave the defendants fourteen days to consider whether they would appeal to the House of Lords, all proceedings being stayed in the meantime.

Solicitors: *Beyfus & Beyfus; Peacock & Goddard, for Rothera & Sons, Nottingham.*

(1) [1895] A. C. 173, 182.

W. L. C.

In re WILLIS. WILLIS *v.* WILLIS.

C. A. 1901 Nov. 5.

[1900 W. 2258.]

Will—Mansion-house—Devise to Trustees—Bare Legal Estate—Powers of Management, Absence of—Tenant for Life and Remainderman—Equitable Estates—Dilapidations—Salvage—Repairs—Expenditure out of Capital—Jurisdiction.

A testator devised a freehold mansion-house to the use of trustees in trust for his sister for life, "subject to the condition that she shall keep the said premises in the state of repair in which she finds them at my death," with remainder in trust for his nephews successively for life subject to the same condition, with remainders over. And he bequeathed personal estate upon trusts corresponding to those of the mansion-house. The will did not impose on the trustees any trusts whatever for the management, maintenance, or repairs of the mansion-house. At the testator's death the house was in general disrepair. Upon an application by the trustees as to whether they could apply capital moneys in their hands in putting the house into good repair :—

Held, affirming Kekewich J., that as the evidence did not shew the case to be one of "salvage," the Court could not, either under the Settled Land Acts (which admittedly did not apply) or its general jurisdiction, authorize the proposed expenditure.

The rule laid down by Chitty J. in *In re De Teissier's Settled Estates*, [1893] 1 Ch. 153, 165, approved of and applied.

John Willis, by his will dated December 18, 1895, after appointing his nephew James Dunbar Willis and Alexander Crossman his executors and trustees, and bequeathing certain legacies, devised his freehold mansion, Cardigan House, Richmond, Surrey, with the grounds and appurtenances, and all other his real property at Richmond, to the use of the trustees in fee simple upon trust for his sister, Janet Ann Willis, so long as she should live and remain a spinster, "subject to the condition that she shall keep the said premises substantially in the state of repair in which she finds them at my death," and from and after her death or marriage in trust for his nephews successively for life, and after the death of each nephew in trust for such nephew's first and other sons in tail, with an ultimate trust for the testator's own right heirs. The life

C. A. 1901 WILLIS, *In re.* WILLIS *v.* WILLIS

interest so given to each nephew was subject to the same condition as was attached to the life interest of the testator's sister Janet Ann Willis. Then, after devising his mansion-houses, Lebanon House and Poulett Lodge at Twickenham, to his trustees in trust for sale, he bequeathed to them the sum of 80,000*l*., directing them to invest the same and the proceeds of sale of the said premises at Twickenham, and to hold such investments, subject to the payment thereout of a certain annuity, upon trusts corresponding as near as the law and circumstances would permit with the trusts thereinbefore declared of Cardigan House aforesaid. The will then contained a power for the trustees to postpone, as long as they thought fit, the sale of all or any of the said premises at Twickenham, and during such postponement to manage and let the same, and to make from time to time out of the rents and profits thereof such expenditure on repairs and insurance of the same premises or any part thereof as they might find necessary or expedient to be made, the rents and profits of the same premises to be disposed of as if derived from the investment of the proceeds of sale of the same premises. And the testator declared that his trustees should stand possessed of his residuary personal estate, subject to certain legacies, upon trusts corresponding as nearly as the law and circumstances would permit with the trusts thereinbefore declared of Cardigan House aforesaid. And he appointed his said trustees to be trustees for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881, and for the purposes of the Settled Land Acts. The will contained no powers in terms for the trustees to manage, maintain, or let the Cardigan House property or to make any expenditure on any repairs thereof.

The testator died a bachelor on November 24, 1899. At his death the persons successively entitled for life under his will were his sister Janet Ann Willis, his nephew James Dunbar Willis, and three other nephews. None of the nephews had had any sons, so that there was no person at present in esse entitled as tenant in tail in remainder of the settled estates. The testator's nephew, James Dunbar Willis, was his heir-at-law.

At the testator's death Cardigan House, which stood in grounds several acres in extent, was in a general state of disrepair, resulting mainly from a settlement of part of the foundations—a settlement which, according to the evidence of a surveyor called in to advise on behalf of the parties, was "very serious and required immediate attention." The brick boundary walls, especially one running along the Petersham Road and standing on sloping ground, also required large expenditure, some parts being stated by the surveyor to be "actually dangerous." The cost of the repairs advised by the surveyor to be necessary was estimated, according to a specification that had been prepared, to amount to nearly 2000*l.* Miss Willis, who was in occupation of Cardigan House as first tenant for life, requested the trustees to provide out of the capital of the legacy of 80,000*l.* or the proceeds of sale of the Twickenham property a sufficient sum to put the Cardigan House property into a good and sufficient state of repair, but as the trustees were doubtful whether they could comply with the request they took out an originating summons against Miss Willis and the several tenants for life in remainder with the exception of James Dunbar Willis, who being a trustee was joined as plaintiff, and appeared also in his capacity of tenant for life in remainder and heir-at-law, for the determination of the question whether the plaintiffs as trustees ought, out of the capital of the legacy of 80,000*l.* and the proceeds of sale of the property at Twickenham and the testator's residuary estate, to execute and do any and what repairs or other works in order to place the Cardigan House property in a good state of repair.

The summons was heard in chambers by Kekewich J., who answered the question in the negative, but gave the plaintiffs leave to appeal. His Lordship made a note containing the following statement: "If the trustees expended any money on salvage they would be entitled to indemnity out of their trust estate, including the proceeds of sale directed to be held upon the same trusts as the mansion-house, and I should not hesitate to authorize expenditure of that character. But it must be restricted to 'salvage.' I will not now attempt to

C. A. 1901 WILLIS, *In re.* WILLIS v. WILLIS.

define salvage beyond saying that it is in substance equivalent to preservation, and cannot be extended to improvement or repairs not necessary 'for preservation.'" His Lordship held that the evidence shewed that the works contemplated were "for the most part repairs in the ordinary sense of the word."

By his Lordship's leave the plaintiffs appealed.

The appeal was heard on November 5, 1901.

It appeared that since the testator's death the borough surveyor had inspected the boundary wall along the Petersham Road and found it fractured in places, and on the appeal a letter was read written by him to Miss Willis, and dated since the hearing of the summons, stating that on a further inspection of the wall he had found evidence of new fractures, and that, in his opinion, the wall was "getting decidedly more dangerous." No formal notice was given by the local authority to rebuild the wall or any portion thereof; but in consequence of that letter the trustees rebuilt the wall out of capital moneys in their hands. This was done by permission of the Court of Appeal pending the appeal, but without prejudice to the question whether the expenditure should come out of capital or income, Miss Willis undertaking to repay the amount expended if the Court should so order.

Renshaw, K.C., and *T. Method*, for the plaintiffs. The testator could not have intended that if his sister, the first tenant for life, found the house in disrepair she was to leave it so. All he intended was to qualify the extent of her liability—that is, to limit her responsibility to keeping up the house as it was at his death. We admit that the Settled Land Act, 1882 (45 & 46 Vict. c. 38), does not apply to this case: it does not come strictly within s. 2, sub-s. 10 (iii.) of that Act, nor within s. 13, sub-s. (ii.), of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), but it is within the spirit of the latter enactment.

[ROMER L.J. All the will says in substance is, "I am anxious that the house should not get worse."]

Primarily a tenant for life is not liable to keep up a house unless punishable for waste. For his own protection he may

keep it up so as to obtain an income from the letting of it. Here the testator says the liability on the tenant for life, whose estate is equitable only, is to keep the house in the state it is in at his death. Anything further than that must be provided out of the estate by the trustees as being in the position of landlords: *In re Hotchkys.* (1)

[ROMER L.J. There the expenditure on repairs was for the benefit of everybody concerned.]

The Court will authorize the expenditure on terms fair to both the tenant for life and the remaindermen. In the present case the learned judge, in holding that the trustees could not raise money for repairs but only for "salvage," must have had in his mind *In re Lord De Tabley* (2) and *In re Montagu* (3); but in *In re Jackson* (4), where the legal estate was in trustees, it was held that the Court, in the exercise of its general jurisdiction, could authorize them to raise money for necessary repairs of houses forming part of an infant's estate. In the present case there can be no doubt that repairs are necessary to prevent the estate deteriorating in value.

[ROMER L.J. I have no doubt that, if you have this case—that unless certain things are done the estate will be lost—the Court may have jurisdiction to authorize money to be raised for those necessary purposes; but the jurisdiction will be exercised with great jealousy.]

In the case of the boundary wall, at least, it was absolutely necessary that it should be rebuilt for the protection of the property and the preservation of its amenities. The surveyor to the local authority has himself stated it to have been "dangerous."

[ROMER L.J. No notice appears to have been served on the testator to make the defects in the wall good, therefore its condition must have been owing to some cause that had happened since his death.]

At all events this letter constituted a good notice to the tenant for life under the Towns Improvement Clauses Act,

(1) (1886) 32 Ch. D. 408.
(2) W. N. (1896) 162 (16).
(3) [1897] 2 Ch. 8.
(4) (1882) 21 Ch. D. 786.

C. A. 1901 WILLIS, *In re.* WILLIS *v.* WILLIS.

1847 (10 & 11 Vict. c. 34), the provisions of which as to "ruinous or dangerous buildings" are incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 of the latter Act; and where a property has been condemned as a "dangerous structure," the Court will, under its general jurisdiction, apart from the Settled Land Act, authorize trustees to perform the work necessary for the protection of the property: *In re De Teissier's Settled Estates.* (1)

Warrington, K.C., and *E. S. Ford,* for the defendants. As representing all parties at present in existence having any interest in the estate, we support the view that these repairs, or some of them, ought to be provided out of capital. What is the duty of the trustees? It is to preserve the estate. Then, if so, out of what funds should that duty be performed? That can only be done out of capital, and the tenant for life will have to submit to the loss of income caused by the withdrawal of capital, and the remaindermen will ultimately take so much less capital. *In re Hotchkys* (2) is, we submit, a distinct authority that it is the duty of the trustees to keep up the estate for the benefit of all the parties entitled to it.

[COZENS-HARDY L.J. In that case there was a discretionary, not an absolute, trust for sale, and upon that Cotton L.J. relies. (3)]

As to the wall the case stands in a somewhat different position from that of the house itself, for if it had not been repaired, it would certainly have had to be pulled down by order of the local authority.

VAUGHAN WILLIAMS L.J. We think that the decision of Kekewich J. ought to be affirmed. It is conceded that the application cannot be justified under the Settled Land Acts at all. How, then, is the application justified? Where do we find the jurisdiction?

Now, this is a case in which the trustees are merely persons who have a bare legal estate in the house in question: they

(1) [1893] 1 Ch. 153, 161-2. (2) 32 Ch. D. 408.
(3) 32 Ch. D. 416.

have no duties to perform with regard to the house; there is no management of the house thrown upon them; and it is not suggested that we have any general jurisdiction to make the order which is asked for, for the expenditure of the costs of these repairs out of the 80,000*l.*

Then it is said that, if we have no jurisdiction to make the order on the ground of any duties thrown upon the trustees, the Court has in some instances general jurisdiction to authorize the expenditure of capital money for the purpose of salving the trust property. The answer to that is that we are not satisfied at all that this is a case of salvage in the sense in which that word is employed in the authorities. When one looks at the will and at what has happened here, one sees that under the terms of the will an obligation is thrown upon each tenant for life to keep the property in the state of repair in which it was when it passed from the testator to the first tenant for life; and, under those circumstances, it is difficult to conceive how there can be any case of salvage if the tenants for life one by one do their duty by this house as provided by the will. The house was standing and was inhabited at the death of the testator, and it certainly is standing and inhabited now. Under those circumstances, it seems to me that, even treating the letter of the borough surveyor as a dangerous-structure notice, there is no case of salvage, if the present tenant for life had done her duty in this matter.

I should like to refer to an observation by Chitty L.J., when Chitty J., in the case to which Mr. Renshaw called our attention, *In re De Teissier's Settled Estates.* (1) That learned judge says (2): "Now, there is one practical observation I make before I dispose of the case, and that is this: if I were to accede to this application, I foresee, in all cases where a testator leaves a dilapidated mansion-house, as he has done here, that there would be first an application by the tenant for life to see what he could get under the Settled Land Acts, and then, failing to obtain all he wished for under that jurisdiction, he would apply, in this ingenious manner, to what is called the

(1) [1893] 1 Ch. 153. (2) [1893] 1 Ch. 165.

C. A. 1901 WILLIS, *In re.* WILLIS *v.* WILLIS. Vaughan Williams L.J.

general jurisdiction of the Court. The Settled Land Acts, whether they do or do not exclude the application of any of the doctrines of this general jurisdiction, at any rate afford a guide to the Court, and are of assistance to the Court in arriving at a proper conclusion. Confessedly, the things asked for on this summons cannot be done under the Settled Land Act, and unless the Court is firm in a matter such as this the Court will be flooded with similar applications." It seems to me that the practical rule which Chitty L.J. there laid down is a most useful rule, and a rule not to be departed from.

Now, just apply that rule in the present case. It is suggested that the present case comes really within the intent of sub-s. (ii.) of s. 13 of the Settled Land Act, 1890. It was said that these repairs are necessary, and are justified under the words of that sub-section. The words are: "Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." The answer to that is that it has been decided that you cannot act under that power unless there is an immediate intention of letting, which there is not here; and it seems to me that the application of that useful rule of Chitty L.J.'s is an answer to so much of the case.

The result is, that it is impossible to make this order unless the case can be made out to be one of salvage within the meaning of the authorities. That has not been made out; and in addition to that, one has the fact that under this will special duties are imposed upon the tenant for life to keep the house substantially in the same repair as the testator left it. Under these circumstances, it seems to me impossible to make the order which is asked for, and the appeal must, therefore, be dismissed. The tenant for life must repay to the trustees the sum expended by them in rebuilding the boundary wall.

ROMER L.J. I agree, and I would only add this. Under this will the trustees have practically a mere legal estate—a mere bare estate. They have no trust to perform with reference to the house at all. They are simply trustees for certain

tenants for life and certain tenants in remainder. That being so, I think that for the purpose of an application of this kind the case cannot be treated differently from the ordinary case of a legal tenant for life with legal remainders. As at present advised, that appears to me to be so. Where you have a case of legal tenants for life with legal remainders, and the parties are not sui juris, then it appears to me that the Settled Land Acts form, as it were, a code under which applications of this kind have to be dealt with; and that where the case is not brought within that code—that is, where a tenant for life is making the application and cannot call in aid any of the provisions of the Settled Land Acts—there is no general jurisdiction that I am aware of enabling expenditure of this kind to be made at the expense of the estate.

COZENS-HARDY L.J. I agree, and I have nothing to add.

Solicitors: *Crossman, Prichard, Crossman & Block.*

G. I. F. C.

C. A.
1901
Nov. 5.

PEPIN *v.* BRUYÈRE.

[1899 P. 748.]

Conflict of Laws—Domiciled Foreigner—Unattested Will—Immovables—Leaseholds—Administration with Will annexed—Lex rei Sitæ—Lex Domicilii—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 9.

The beneficial interest in leasehold property in England will not pass under the will of a domiciled foreigner executed according to the law of his domicil but not attested as required by the Wills Act, 1837, notwithstanding that letters of administration with the will annexed have been granted by the Probate Division.

Decision of Kekewich J., [1900] 2 Ch. 504, affirmed.

APPEAL from the decision of Kekewich J. (1)

Warrington, K.C., and *Mackay*, for the appellants, the defendants. The learned judge below relied upon the statement of the law as given in Dicey on the Conflict of Laws, pp. 520, 522. That statement is founded upon *Freke* v. *Lord Carbery* (2); but that case dealt really with a substantial question of law—whether certain provisions in the will were repugnant to the Thellusson Act: the question of formality of execution, which is the question here, was not before the Court. The Wills Act, 1837 (1 Vict. c. 26), applies only to wills of persons having an English domicil: *Croker* v. *Marquis of Hertford* (3); *Bremer* v. *Freeman* (4); *In re Price*. (5) If a will of a foreigner is good according to the law of his domicil, it will pass his personal estate, though not his real estate, in England: *Price* v. *Dewhurst* (6); *D'Huart* v. *Harkness*. (7) In Dicey on the Conflict of Laws, pp. 72, 73, 519, 520, it is said that leaseholds are not personal estate, but partake of the character of real estate. We submit, however, that for the purposes of wills they are in fact personal estate, except in the case of a term attending the inheritance: 2 Blackstone's Commentaries, p. 501;

(1) [1900] 2 Ch. 504.
(2) (1873) L. R. 16 Eq. 461.
(3) (1844) 4 Moo. P. C. 339.
(4) (1857) 10 Moo. P. C. 306, 357.
(5) [1900] 1 Ch. 442.
(6) (1838) 4 My. & Cr. 76; 4 R. R. 185.
(7) (1865) 34 Beav. 324, 327.

2 Stephen's Commentaries, 9th ed. pp. 189, 190; Williams on Personal Property, 10th ed. pp. 355–6; Swinburne on Wills, 7th ed. p. 49; *Whitchurch* v. *Whitchurch*. (1) Sect. 5 of the Statute of Frauds (29 Car. 2, c. 3), which requires devises and bequests of lands to be in writing, does not apply to terms of years: 1 Powell on Devises, 3rd ed. p. 62. The requirements for the validity of a will of personal estate are stated in 2 Blackstone's Commentaries, pp. 500–1. Westlake on Private International Law, which was not referred to by the learned judge, appears to be of a contrary opinion to Dicey on the Conflict of Laws, for the former says (3rd ed. p. 192, pl. 169) that a term of years will pass under a will of personal estate—that is, a will which is valid according to the law of the domicil. All that the law of England requires in order to admit a foreign will to probate is proof that the formalities of the law of the foreign domicil have been complied with: *In the Goods of Deshais*. (2) Accordingly, if the present will was executed according to the law of the testator's domicil, it is sufficient to pass his interest in this leasehold property; and this proposition is further supported by *Hood* v. *Lord Barrington* (3), *Duncan* v. *Lawson* (4), and *In re Watson*. (5) In *De Fogassieras* v. *Duport* (6), which was referred to by the learned judge, and will probably be relied on by the other side, Warren J. merely followed *Freke* v. *Lord Carbery* (7), where, as already pointed out, the question was one of substance and not, as here, one of formality only.

P. O. Lawrence, *K.C.*, and *Jason Smith*, for the plaintiffs, the testator's next of kin, were not called upon.

VAUGHAN WILLIAMS L.J. The real question raised in this case is whether or not leasehold property, or an interest in leasehold property, can be treated as personal property so that the law of the domicil of the testator will govern, not only the form and manner of the making of the testament, but also of the disposition of the beneficial interest in the property. In

(1) (1724) 2 P. Wms. 236; 1 Str. 619; Gilb. Eq. Rep. 168, 169.
(2) (1865) 34 L. J. (Prob.) 58.
(3) (1868) L. R. 6 Eq. 218.
(4) (1889) 41 Ch. D. 394.
(5) (1887) 35 W. R. 711.
(6) (1881) 11 L. R. Ir. 123.
(7) L. R. 16 Eq. 461.

C. A. 1901 PEPIN v. BRUYÈRE. Vaughan Williams L.J.

my judgment, the decision of Kekewich J. is perfectly right. Speaking for myself, I do not require to go any further than the decision of Lord Selborne in *Freke* v. *Lord Carbery*. (1) As appears from the first paragraph of the head-note, that case decided that "the validity of a testamentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicil." The whole basis of the judgment of Lord Selborne is this—that, although a leasehold interest is a chattel interest, yet for the purposes of testamentary disposition a chattel interest in land, such as a leasehold interest is, must be treated as immovable property and must follow the law of the place where the land is situate. I do not know that, for the purpose of deciding the present appeal, it is necessary to go beyond the authority of *Freke* v. *Lord Carbery* (1), but I will call attention to some other authorities, the first of which is *Duncan* v. *Lawson*. (2) The judgment of Kay J., as he then was, in that case seems to me also in principle to cover the whole of the question raised on the present appeal. He says (3): "But the lex loci governs the devolution of immobilia in case of intestacy, just as it does of freehold property. There is no possibility of doubt that, if the Scotch heir and the English heir were different persons, the English heir and not the Scotch heir would take the undisposed of freeholds in England. The executor is merely the hand to effect the distribution of personal estate. As to the persons entitled under the distribution to succeed to the undisposed of leaseholds, the lex loci must govern, or it would practically have no effect at all. The matter is more clear if you take the case of an absolute intestacy, where no executor has been appointed. As to English leaseholds, the Probate Court in England would in that case be called on to appoint an administrator. No doubt such administrator would be chosen from the next of kin according to English law, and it would be his duty, subject to the satisfaction of the testator's debts, probate duty, and the like, to distribute the leaseholds among the persons entitled. At this stage of the proceeding the lex loci

(1) L. R. 16 Eq. 461. (2) 41 Ch. D. 394.
(3) 41 Ch. D. 397.

must determine, independently of the testator's domicil, to whom such distribution must be made." It is quite plain from that judgment that Kay J. assumes everything which is necessary for the purpose of deciding the present case in favour of the respondents, and it seems to me that *Hood* v. *Lord Barrington* (1) proceeds on exactly the same grounds.

But the last case which counsel considered it his duty to bring to our attention, although against him, is a case almost on all fours with the present. I refer to *De Fogassieras* v. *Duport.* (2) The head-note to the report is this: "A French subject, domiciled and resident in France, by his will, executed as required by the 1 Vict. c. 26 (but not made and executed as required for the validity thereof as required by the law of France), bequeathed his personal estate in England and Ireland to trustees, whom he also named executors, and he gave and devised leaseholds for years in Cork in Ireland, and all other his real estate and chattels real in England and Ireland to the same trustees:—*Held*, that the will was valid as to the chattels real, but invalid as to the personal property of the testator, other than the chattels real, and so far as it purported to appoint executors or to revoke any prior testamentary disposition of personal property other than chattels real, and the Court granted to the trustees in that character alone administration cum test. ann. limited to the chattels real in Ireland." Now, that is an extremely strong case. It is a case in which the will of a domiciled Frenchman was bad as to personalty because it did not comply with French law. Personal property generally follows the law of the domicil of the testator, and the will, in order to be effective, must be a good will according to the law of the domicil; but in that case, though treating the will as a bad will quâ personalty, the Court held that it was a good will in respect of leasehold property because it had complied with the provisions of the Wills Act, 1837. Nothing certainly can be stronger than that. It shews that leasehold property is dealt with as immovables—that is, it is governed by the law of the country where the land which is the subject of the lease is situate. I have really nothing to add to the

(1) L. R. 6 Eq. 218. (2) 11 L. R. Ir. 123.

C. A. 1901 PEPIN v. BRUYÈRE. Vaughan Williams L.J.

judgment of Warren J. in that case, and the decree, which is set out in the report, makes the decision still more clear. In his short and forcible judgment the learned judge says (1): "How does the law stand as regards the leaseholds, the immovable personal estate in Ireland? Mr. Jarman's opinion was that this species of property was governed by the lex loci, in the same manner as lands held for a freehold tenure. It appears, from the note to Jarman, that later text-writers did not concur with Mr. Jarman. But the matter does not depend on the views of text-writers, for in *Freke* v. *Lord Carbery* (2) Lord Selborne decided that testamentary dispositions of an English leasehold are governed by the law of England, i.e., the lex loci rei sitæ, and not by the law of the testator's domicil. In *In the Goods of Gentili* (3) this Court acted on the same principle." It is not only that this Court acted on the same principle in *In the Goods of Gentili* (3), but that case is cited in *Duncan* v. *Lawson* (4) with approval at the end of the judgment.

On these authorities I have no doubt that the appeal fails and must be dismissed.

ROMER L.J. I agree, and have nothing to add.

COZENS-HARDY L.J. I agree.

Solicitors: *Herbelet; Baker & Nairne.*

(1) 11 L. R. Ir. 126.
(2) L. R. 16 Eq. 461.
(3) (1875) Ir. R. 9 Eq. 541.
(4) 41 Ch. D. 394.

G. I. F. C.

In re HERBERT REEVES & CO.

C. A. 1901 Nov. 6.

[1901 R. 645.]

Practice—Appeal—Order whether Final or Interlocutory—Solicitor—Summons for delivery of Bill of Costs and Taxation—Order dismissing Summons——Rules of Supreme Court, 1883, *Order* LVIII., *rr.* 3, 9, 15.

An order dismissing an originating summons for delivery of a bill of costs by a solicitor and taxation is a final order, and an appeal from it should be treated as a final, not an interlocutory, appeal.

APPEAL from Kekewich J.

On April 10 an originating summons was taken out by Mr. C. E. Bassington for an order that Messrs. Herbert Reeves & Co., solicitors, should deliver a bill of costs in all matters wherein they had been concerned for him, and that the bill when so delivered should be referred to the taxing officer to be taxed, and that the said solicitors should refund what (if anything) they might on such taxation appear to have been overpaid; that the taxing officer should tax the costs of the reference and certify what should be found due to or from either party in respect of the bill and demand, and of the costs of the reference to be charged, if payable according to the event of the taxation, pursuant to the statute; and that upon payment of what might appear to be due to the said solicitors they should, if required, deliver up all papers in their custody belonging to the applicant.

On August 7, 1901, an order was made by Kekewich J. dismissing the summons with costs.

The applicant obtained leave from Kekewich J. to appeal from this order (if leave was necessary), and gave a four-day notice of appeal accordingly, on the footing that this was an interlocutory order. The time limited by Order LVIII., rr. 9, 15, for giving notice of an appeal from the order as a final order had expired. The appeal came on for hearing in the interlocutory list, and a preliminary objection was taken that the order appealed from was a final order, that the notice of appeal ought to have been a fourteen days' notice under

C. A. 1901

HERBERT REEVES & Co., *In re.*

Order LVIII., r. 3, and that the appeal ought to have gone into the general list.

S. O. Buckmaster, for the appellant.

P. O. Lawrence, K.C., and *B. A. Hall*, for Herbert Reeves & Co. The order appealed from was a final order, and this appeal ought not to have been inserted in the interlocutory list. The test whether an order is final or interlocutory is whether the application is of such a nature that, whether it succeeds or whether it fails, the order made upon it must determine the whole matter in dispute: *Salaman* v. *Warner*. (1) The present order has stopped the litigation and is final; but an order to the contrary would have been equally final. An order for taxation in the Chancery Division contains directions to pay the amount which shall be found due. On that direction execution can be issued as soon as the taxation is completed; so an order for taxation is final. An order nisi for foreclosure, which is not so clear a case as this, is a final order: *Smith* v. *Davies*. (2)

S. O. Buckmaster, for the appellant. The order was not final according to the test in *Salaman* v. *Warner*. (1) An order might have been made which would not have disposed of the whole question. For instance, an order, without more, that a bill should be delivered; or a refusal to make any order on the ground that the client could get relief in other proceedings. It may be that the order asked for would have been final, but there was nothing to compel the judge to make that order. The taxing master's certificate itself is not final: either party can move to vary it and appeal from an order made on that motion: *In re Oddy*. (3)

The respondents are solicitors, and the application is for an order against them as solicitors. The jurisdiction of the Court over them is quite different from that over other people. An order on solicitors to deliver a bill or give up papers is only a step in procedure; it is part of the machinery of the Court to ascertain the rights of the parties: *In re Oddy*. (3)

(1) [1891] 1 Q. B. 734. (2) (1886) 31 Ch. D. 595.
(3) [1895] 1 Q. B. 392.

The order actually made is not final. There was a question as to the validity of an agreement, and the order has not taken away the appellant's right to impeach that agreement.

If this is a final appeal, we ask the Court to extend the time and advance the appeal. It will be very inconvenient if applications of this sort are delayed.

VAUGHAN WILLIAMS L.J. This is an appeal from an order made by Kekewich J. dismissing a summons taken out for delivery of a bill of costs by solicitors and for taxation of that bill. An objection in the nature of a preliminary objection has been taken that this is really a final and not an interlocutory appeal. It is an objection which, if nothing is done to correct the mistake, is fatal to this appeal; and I am of opinion that it is a good objection. In my opinion the order made on this summons is a final order. The question which is raised upon a summons of this sort is the question whether there is a right to the delivery of the bill and to taxation, and that question is finally decided one way or the other whatever order is made upon the summons. If the order is, as the order of Kekewich J. is, that the summons stand dismissed, there is once and for all a final determination that the client has no right to relief under the Solicitors Acts in the nature of delivery of a bill and taxation. If, on the other hand, an order is made for delivery of a bill and taxation, that finally disposes of the matter on the summons on the other possibility; and once and for all it is decided that the client is, in the circumstances before the Court, entitled to an order for delivery and taxation. It is suggested that, in the last alternative I have put, the order is not final, because after the order there will be taxation and a certificate, and possibly a review of the taxation. But it is really plain that the mere fact that there may be inquiries to be carried out after the order or after the judgment has been delivered does not prevent the order or the judgment from being a final order or a final judgment. After you have got an order for winding up a company, there are obviously an enormous quantity of questions which may be raised, and, as Cozens-Hardy L.J. pointed out in the course of the argument,

C. A. 1901 HERBERT REEVES & CO., *In re.* Vaughan Williams L.J.

after you get an order in a redemption action there are inquiries which will have to be proceeded with after the order. In these circumstances it seems to me that the objection raised that this is a final and not an interlocutory order is a good objection. I can quite understand that people may regard a summons for an order for delivery of a bill of costs and taxation as a summons the ultimate end of which is, not to ascertain whether or not there is a liability to deliver a bill and have it taxed, but as a summons initiated for the purpose of ascertaining the quantum of money which the client is liable to pay to the solicitor, or which the solicitor may have to pay to the client. The proceeding may be so regarded, but it is not so here, and the form of the proceedings itself shews that as things stand one must regard the object of the summons as being to ascertain whether or not there was a liability to deliver a bill of costs and have it taxed. It is also said that it is an inconvenient thing that questions of this sort as to the liability to deliver bills of costs and taxation should stand over for the length of time for which they will have to stand over if the appeals come into the final list before the question can be determined. If that is so, it can be got over by an alteration of the rules; but we sitting here cannot deal with the matter otherwise than according to the existing practice. I say nothing about any extension of time for giving notice of appeal, or any other order which may be made to relieve the client Bassington from the effects of the mistake which has been made, because I think that it is better in the first instance to decide this preliminary question, and as soon as we have done that we will see whether there is anything to be said as to giving relief.

ROMER L.J. I agree, and need only add this: when you have, as here, not an application in an action, but an original proceeding, an originating summons, in order to see whether an order made on that proceeding is final or not, you ought to consider what was the object of the proceeding as a matter of substance, and the test whether an order is a final order or not is to be arrived at by considering as a matter of substance what

was the matter in dispute—what was it that gave rise to the litigation in which the order is to be made. Applying that test here, what was the matter in dispute and decided by this order? The matter in dispute was simply this: the applicant said the respondents were his solicitors and ought to give him a bill of costs, and that that bill ought to be taxed. The solicitors opposed that, and, whether on the ground that they were not his solicitors or on some other ground, objected to deliver a bill. That was in substance the matter in dispute between the parties; and what was the order made? It was an order dismissing the application. If the order had been the other way, if an order had been made in favour of the applicant, it would equally have disposed of the matter in dispute. That being so, the order would be a final order within the definition in *Salaman* v. *Warner* (1), and, following that, I am of opinion that this was a final order.

COZENS-HARDY L.J. I agree. I think the order is none the less final because it does not settle the exact amount due between the parties.

[The Court granted an extension of time for giving notice of appeal, and directed that the appeal should be transferred into the general list and come on for hearing after interlocutory business on the following Wednesday. It came on accordingly on November 13 and 14, and was compromised.]

Solicitors: *Godfrey & Webb; Herbert Reeves & Co.*

(1) [1891] 1 Q. B. 734.

H. C. R.

C. A.
1900
BUCKLEY J.
July 26; *Aug.* 3.
C. A.
1901
Oct. 30, 31.

PELHAM CLINTON *v.* DUKE OF NEWCASTLE.

[1900 C. 788.]

Will—Construction—"Issue"—Estate in Special Tail—Rule in Shelley's Case.

A devise to "Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants, in failure of which" then over:—

Held, to be equivalent to a devise to "Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendants, in failure of which" then over, and thus to create an estate in special tail male in Charles.

Decision of Buckley J. affirmed.

Henry Pelham, fourth Duke of Newcastle, by the fifth codicil, dated August 14, 1846, to his will, dated January 31, 1814, willed and bequeathed to his son, Lord Charles Pelham Pelham Clinton, certain estates; and, after providing that his eldest son, the Earl of Lincoln, might purchase and redeem those estates for certain sums of money, the testator continued as follows: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants, in failure of which to my son Thomas, to the exclusion of any issue by his present wife, but to his issue male by any future wife should she be a fit and worthy gentlewoman, in failure of which" then over.

At the date of that codicil Lord Charles, who was the testator's second son, was unmarried. On August 10, 1848, he married Elizabeth Grant. On January 12, 1851, the testator died. Disputes arose, and in 1851 Lord Charles barred the entail of the estates in question, and in 1852 he conveyed them to the fifth Duke. On December 14, 1894, Lord Charles died. The plaintiff in this action was the eldest son of the marriage of Lord Charles with Elizabeth Grant; he was born on July 23, 1857—that is, after the death of the testator; and he brought the present action against the seventh Duke with the object of recovering the property.

On June 18, 1900, an order was made upon the application of the defendant (and upon admissions by him of the marriage; that Elizabeth Grant was a fit and worthy gentlewoman; that the plaintiff was the eldest son of the marriage; and that Lord Charles died as above stated) for the determination of the point of law, whether upon the true construction of the fifth codicil it conferred on Lord Charles a mere life estate, or an estate in tail male or in tail, or an estate in fee simple. The action now came before the Court under that order.

The action was heard before Buckley J. on July 26, 1900.

Swinfen Eady, Q.C., and *A. F. Peterson*, for the plaintiff. Lord Charles only took a life estate in the property devised by the fifth codicil. Therefore, the conveyance by him was only operative to that extent, and on his death the property vested in the plaintiff. The rule in *Shelley's Case* (1) does not apply where the course of descent is altered by words superadded to the limitation: Tudor's Leading Cases on Real Property, 4th ed. p. 351; *Hamilton* v. *West* (2); *Dodds* v. *Dodds* (3); *Brookman* v. *Smith*. (4) The course of descent is altered by this codicil. The words "to such issue" do not include the whole of Lord Charles' issue. If he had married an unworthy person and had issue by her, they would not have taken anything. The gift is to a selected class of his issue, and they take as purchasers. The codicil must be read as giving an estate for life to Lord Charles, and then to the children of the particular marriage as purchasers.

Haldane, Q.C., *Vaughan Hawkins*, *Ingle Joyce*, and *J. E. H. Benn*, for the defendant. We admit that where the words indicate a course of descent different from that of the law the rule in *Shelley's Case* (1) does not apply; but the case does not turn on that point. The codicil might be construed to give an estate in fee to Lord Charles; however, we agree that the better construction is to read it as if the word "and" were inserted after "my son Charles." Then it is a clear gift of an

(1) (1581) 1 Rep. 93 b.
(2) (1846) 10 Ir. Eq. Rep. 75.
(3) (1860) 11 Ir. Ch. Rep. 374.
(4) (1871) L. R. 6 Ex. 291; (1872) L. R. 7 Ex. 271.

C. A. 1901 PELHAM CLINTON v. NEWCASTLE (DUKE OF).

estate in special tail male to Lord Charles; it is not a gift of a life estate enlarged by the rule in *Shelley's Case*. (1) A gift to a single donee in special tail may be to him and his heirs which he shall beget on the body of his (specified) wife, or on the body of some person by name, even if not his wife at the time of the limitation; or, as in this case, upon the body of one of a specified class: Challis' Law of Real Property, 2nd ed. pp. 266, 267, 268; *Page* v. *Hayward* (2), also reported in Pigott on Recoveries, p. 176; Preston on Estates, vol. ii. p. 412; *Chudleigh's Case*. (3) An estate in special tail does not alter the course of descent. The word "issue" means "heirs of the body." It is nomen collectivum, and applies to all Lord Charles' descendants; the general intention that the estate should travel through the issue is clear, and it can only be satisfied by holding that he takes an estate tail: Jarman on Wills, 5th ed. vol. ii. p. 1257; *Bowen* v. *Lewis* (4); *Roe* v. *Grew* (5); *Jesson* v. *Wright* (6); *Van Grutten* v. *Foxwell* (7); Fearne on Contingent Remainders, 10th ed. vol. ii. p. 254; *Roddy* v. *Fitzgerald*. (8) The words "male descendants" mean the same as heirs of the body: *Bernal* v. *Bernal* (9); but they are superfluous: *Backhouse* v. *Wells* (10); *Doe* v. *Collis*. (11)

Swinfen Eady, Q.C., in reply. There is no authority for saying that such a gift as this creates an estate in special tail. In *Page* v. *Hayward* (2), there was a gift over on failure of a subsequent condition, and the words of condition were treated as a limitation. To create an estate in special tail the woman must be specified—not arbitrarily selected in this way: Challis' Law of Real Property, 2nd ed. p. 268; Co. Litt. ss. 14, 15, 16, 19; Tudor's Leading Cases on Real Property, 4th ed. p. 302; Comyn's Dig. vol. iv. p. 18, B 5.

Cur. adv. vult.

(1) 1 Rep. 93 b.
(2) (1703) 2 Salk. 570; Pigott on Recoveries, p. 176.
(3) (1589) 1 Rep. 113 b.
(4) (1884) 9 App. Cas. 890, 907.
(5) (1767) 2 Wils. 322; Wilm. 272.
(6) (1820) 2 Bli. 1; 21 R. R. 1.
(7) [1897] A. C. 658.
(8) (1858) 6 H. L. C. 823.
(9) (1838) 3 My. & Cr. 559; 45 R. R. 330.
(10) (1714) 10 Mod. 181.
(11) (1791) 4 T. R. 294; 2 R. R. 388.

1900. Aug. 3. BUCKLEY J. stated the facts, and continued :— First, as to some things which I think are plain. The form of the gift is in the first place to Charles in such terms as would, if there were nothing more, give him the fee simple, but the words which direct that the proceeds, if the Earl of Lincoln purchases, are "to go with the limitations of this will," make it plain that, whether the estates are purchased or not, the estates or their proceeds are to go on the limitations which are expressed with regard to the proceeds. Secondly, as regards these limitations, I think it clear that the words are to be read as if a comma or the word "and" were inserted next after the word "Charles," so that the limitations will be to "my son Charles, and" if he marries, &c., to such issue male. Thirdly, I think that the words "and has issue male" mean "and has issue male by marriage with a fit and worthy gentlewoman"; and, fourthly, that the words "if he marries," &c., are not words of condition, but words limiting or defining the issue male whom the testator calls "such issue male." To express these last three points concisely, I think the meaning of the words is the same as if the testator had said "to my son Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendants, in failure of which" then over.

The contention which the plaintiff put forward was that the rule in *Shelley's Case* (1) has no application to these limitations, for that upon the authorities to which he referred the rule is that, if to the words of limitation of the inheritance there are superadded words of limitation which alter the course of descent, the rule in *Shelley's Case* (1) does not apply, and that in such case the heirs take not by descent, but as purchasers : *Hamilton* v. *West* (2), *Dodds* v. *Dodds* (3), and other cases of that kind. It was argued that in this case Charles cannot take an estate tail, for that the limitation is such as that not all but only a selected class of his issue male are to take. Thus, for instance, if Charles married a fit and worthy gentlewoman and had issue male, and then married a lady who did not satisfy those words

(1) 1 Rep. 93 b. (2) 10 Ir. Eq. Rep. 75.
(3) 11 Ir. Ch. Rep. 374.

C. A. 1901 PELHAM CLINTON v. NEWCASTLE (DUKE OF). Buckley J.

and again had issue male, the latter class of issue are not to take by virtue of the gift.

The argument that this exception exists to the application of the rule in *Shelley's Case* (1) is, I think, well founded, and in fact it was not disputed by the defendant. But the first answer given was that the rule in *Shelley's Case* (1) has nothing to do with this case; but the effect of these limitations is to give to Charles an estate in special tail male. For that proposition reliance was placed upon *Page* v. *Hayward* (2), which is reported in 2 Salk. 570, and more fully in Pigott on Recoveries, 176. There Nicholas Searle by his will devised to his niece Mary Bryant and the heirs male of her body upon condition and provided that she intermarry with and have issue male by one surnamed Searle. Holt C.J. held that the estate devised to Mary was a good estate tail, "but it is a special entail, it is an estate to her and the heirs male of her body begotten by a Searle, which is a middle entail, not the highest nor the least; for it might have been to her and the heirs of her body begotten by J. Searle which had been more particular, yet this is a good estate tail within the statute de donis; for it is within the reason of that statute." Further, that the estate tail of Mary "does not cease by marrying one that is not a Searle; for the remainder over is in default of both conditions, and in the meantime it is limited to her and the heirs male of her body, and she may survive the first husband and marry a Searle, and so there is a possibility as long as she lives." As to this case, it was argued in reply that what was given to Mary was an estate in tail male followed by a condition which could be defeated by barring the entail. But the contrary was held, for the second ruling of the Chief Justice was that the words "upon condition," &c., though they are express words of condition, shall be taken to be a limitation. This, therefore, appears to me to be a direct authority that a good estate in special tail may be created by words of limitation to the issue male of a marriage with a person of a certain name. In Mr. Challis' book on the Law of Real Property, 2nd ed. p. 268, *Page* v. *Hayward* (2) is referred to as an authority for the

(1) 1 Rep. 93 b. (2) 2 Salk. 570; Pigott on Recoveries, p. 176.

proposition that on a gift to a single donee in special tail the wife (or husband) assigned to the donee need not necessarily be a specified individual, but may be one of a specified class, for example, may be any person bearing a specified name. In Preston on Estates, vol. ii. of 1827, at p. 412, it is stated: "An estate tail special in this particular, ascertains the person by whom, or on whose body, the heirs inheritable to the entail shall be begotten thus . . . . Fourthly, on the body of any person who is not his wife, and although she be the wife of another man, and whether the donee be a single or a married man; or on the body of a person of particular rank; as a person of the degree of peerage; or on the body of a person being a Protestant, &c., &c., or a person who shall have a given portion, as 10,000*l.*"

It seems to me that, without any recourse to the rule in *Shelley's Case* (1), there is here created (subject to something which I must say upon the word "issue") a valid estate in special tail.

As regards the word "issue," it has been said that a devise to A. and his issue is the aptest way of describing an estate tail according to the statute: see, per Lord Thurlow, *Hockley* v. *Mawbey*. (2) Primâ facie, I think "issue" is a word of limitation equivalent to heirs of the body, and not a word of purchase.

In *Roe* v. *Grew* (3) a devise to "my nephew George Grew to hold unto George Grew for life, and after his decease to the use of the issue male of his body lawfully to be begotten and the heirs male of the body of such issue male, and for want of such issue male then to George Dodson, his heirs and assigns for ever," was held to be an estate tail in George Grew; and Gould J. said: "The word 'issue' is used in the statute de donis promiscuously with the word 'heirs.' The term 'issue' comprehends the whole generation, as well as the word 'heirs'; and, in my judgment the word 'issue' is more properly, in its natural signification, a word of limitation than of purchase."

The decision of the House of Lords in *Roddy* v. *Fitzgerald* (4)

(1) 1 Rep. 93 b.
(2) (1790) 1 Ves. Jr. 143, 149; 1 R. R. 93.
(3) 2 Wils. 322; Wilm. 272.
(4) 6 H. L. C. 823.

C. A. 1901 PELHAM CLINTON v. NEWCASTLE (DUKE OF). Buckley J.

is another authority directly in point upon this part of the case. There was there a gift over "in failure of issue," and the House held that in such a case it is presumed that "issue" means "heirs of the body." Here the gift over is "in failure of which"—that is, "in failure of such issue male and their male descendants." It is, I think, therefore to be presumed that the word "issue" has been used by the testator as meaning "heirs of the body," and it is for the parties seeking to give it another meaning to shew clearly from the context of the will that the testator intended to give it a different meaning. As regards the meaning of the words "male descendants" I may refer to the case of *Bernal* v. *Bernal*. (1)

For these reasons it seems to me that, apart altogether from the rule in *Shelley's Case* (2), Charles took an estate in special tail male.

But, further, if the rule in *Shelley's Case* (2) has application, I first observe that there is here no gift in express terms to Charles of a life estate. The first gift in the will to him would, without more, give him the fee simple. The limitations stated with regard to the proceeds do not express his estate to be a life estate, and I apprehend that what I have to look at is to see whether the testator did not intend to make the estate travel through the defined class of issue male generally. If he did this, I can only give effect to that intention by giving to the ancestor an estate in tail. Otherwise, as Lord Cairns said in *Bowen* v. *Lewis* (3), "the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue." So here, if I were to hold that there is not an estate in special tail male in Charles, but that the first taker in the series of issue took by purchase, it would follow that only the descendants of that particular head of the issue would take, and the words "in failure of which" would not be satisfied. Upon the principle, therefore, of *Jesson* v. *Wright* (4) and *Van Grutten* v. *Fox-*

(1) 3 My. & Cr. 559, 581; 45 R. R. 330.
(2) 1 Rep. 93 b.
(3) 9 App. Cas. 890, 907.
(4) 2 Bli. 1; 21 R. R. 1.

well (1), I ought to say that the rule in *Shelley's Case* (2) is to be applied so as to give effect to the general intention of the testator that the whole class of issue male by a fit and worthy gentlewoman shall be exhausted before the gift over shall take effect.

For these reasons I hold that, on the true construction of the fifth codicil, Lord Charles took, not a mere life estate, but an estate in special tail male.

The action was placed in the paper for trial, and was dismissed.

H. C. R.

C. A.

The plaintiff appealed. The appeal came on for hearing on October 30, 1901.

Swinfen Eady, K.C., and *A. F. Peterson*, for the plaintiff. On the face of the will there is an intention to give Charles an estate for life, with remainder to his issue as purchasers. This case is not within the rule in *Shelley's Case* (2), because the only limitation here is to a special class of heirs; nor is it within the rule in *Wild's Case* (3), because there is not here any immediate gift to a man and his issue. The issue are to take only on the happening of a double contingency—the contingency of Charles marrying and having issue by a wife of a particular description. The rule in *Wild's Case* (3) was considered by the House of Lords in *Byng* v. *Byng*. (4)

[ROMER L.J. *Wild's Case* (3) does not apply.]

Roe v. *Grew* (5), on which Buckley J. relied, turned upon the reasoning in *Shelley's Case* (2), and is not in point. There is here no estate tail in Charles, because it has not been given by the will. If Charles is held to take an estate tail, the result of barring the entail might be that the estate would go to the very persons whom the testator desired to exclude. Further, the superadded words, "and their male descendants," shew an intention to limit the word "issue" to children, because if

(1) [1897] A. C. 658.
(2) 1 Rep. 93 b; Tudor's Real Property Cases, 4th ed. p. 332.
(3) (1599) 6 Rep. 16 b; Tudor's Real Property Cases, 4th ed. p. 361.
(4) (1862) 10 H. L. C. 171.
(5) 2 Wils. 322; Wilm. 272.

C. A. 1901

PELHAM CLINTON v. NEWCASTLE (DUKE OF).

"issue male" was intended to cover all descendants the additional words would be superfluous.

Haldane, K.C., Vaughan Hawkins (*J. E. H. Benn* with them), for the defendant. First, upon the construction of the will, this is a gift to Charles in special tail male; secondly, even if not, it is so by virtue of the rule in *Shelley's Case*. (1) We do not rely upon *Wild's Case*. (2) And if this is a gift in special tail male, whether issue capable of taking were born or not, Charles could bar the entail: Fearne on Contingent Remainders, 10th ed. vol. i. p. 424; *Page* v. *Hayward* (3); *Roe* v. *Grew* (4); *Roddy* v. *Fitzgerald*. (5) Those three cases govern this case. A gift in special tail is necessarily expressed by some such word as the word "if," but that does not prevent the gift from being immediate. It is said that Charles takes an estate for life; but the will contains no gift to Charles for life. Then reliance is placed on the superadded words "and their male descendants," but those words will not alter the character of the gift to the issue so as to enable them to take as purchasers. The rule in *Shelley's Case* (1) is not a technical rule, but is a rule of substance to give effect to the general intention of the testator and make the estate travel through the issue generally: *Bowen* v. *Lewis* (6); and see *Van Grutten* v. *Foxwell*. (7)

Swinfen Eady, K.C., in reply. In order that the rule in *Shelley's Case* (1) may operate, the limitation to the heirs must be by way of remainder, not by way of executory devise: Tudor's Leading Cases on Real Property, 4th ed. p. 341. It is submitted that here the limitation to the issue is an executory devise, not a remainder. The authorities relied on for the defendant are all distinguishable from the present case. Here the gift over is not, as it was in *Roddy* v. *Fitzgerald* (5), upon a general failure of issue, but upon the failure of a limited class of issue. There is no reason why the issue male of Charles should not take in succession as purchasers.

(1) 1 Rep. 93 b.
(2) 6 Rep. 16 b; Tudor's Real Property Cases, 4th ed. p. 361.
(3) 2 Salk. 570; Pigott on Recoveries, p. 176.
(4) 2 Wils. 322; Wilm. 272.
(5) 6 H. L. C. 823.
(6) 9 App. Cas. 890, 907.
(7) [1897] A. C. 658.

LORD ALVERSTONE C.J. I think Buckley J. has arrived at the right conclusion, and I doubt whether I can usefully add anything to his judgment; but, inasmuch as the case is one of considerable importance, and certainly raises a very interesting point of law, I think I ought to state my reasons for concurring in his judgment.

The short point for our decision arises thus. In the year 1851 Lord Charles Pelham Clinton executed a disentailing deed. It is contended that at that time he had only a life estate, or that at any rate he had not an estate tail in the estates comprised in the deed. The estates were devised by a codicil to the will of the fourth Duke of Newcastle, and Buckley J. has held on the construction of that codicil that Lord Charles took, not a mere life estate, but an estate in special tail male. It will, I think, be convenient that I should deal with the authorities before I come to the construction of the codicil itself, because it seems to me that in this case, as, I suppose, in nearly every other will case, we must gather the intention of the testator from the words which he has used.

I will not go so far as to say that *Page* v. *Hayward* (1) is an authority which concludes the point now raised. But it seems to me to be an instance of the manner in which a will containing provisions not very dissimilar from those of this codicil ought to be construed. There the testator devised land to his niece Mary and the heirs male of her body, "upon condition and provided that she intermarry with and have issue male by one surnamed Searle"; and in default of both conditions he devised to his niece Elizabeth in the same manner, and in default thereof over. The Court came to the conclusion upon the words of the will, "that the estate devised to Mary was a good estate tail, and so was the estate to Elizabeth; but it is a special entail, it is an estate to her and the heirs male of her body begotten by a Searle." And the Court further resolved—and this seems to me important—"that the words, upon condition, &c., though they are express words of condition, shall be taken to be a limitation." I think the Court arrived at the special estate tail, which they held that Mary took, by looking

(1) 2 Salk. 570; Pigott on Recoveries, p. 176.

C. A. 1901 PELHAM CLINTON v. NEWCASTLE (DUKE OF). Lord Alverstone C.J.

at the subsequent words which they construed as words of limitation, that is, as I understand it, words which defined the estate which Mary took. It is true that in their third resolution the Court said, "That the estate tail of Mary and Elizabeth, or either of them, does not cease by marrying one that is not a Searle; for the remainder over is in default of both conditions, and in the meantime it is limited to her and the heirs male of her body, and she may survive the first husband and marry a Searle." It seems to me that that is the necessary conclusion from the fact the Court had previously found upon the construction of the words of the will that Mary had a special estate tail.

Again, with regard to *Roe* v. *Grew* (1), I do not suggest that it is an authority which concludes the present case. But there the Court, looking at the whole will, came to the conclusion that there was an estate tail, and they did so for reasons which in my judgment are applicable to the present will. Wilmot C.J. said that, as of two intentions indicated by the testator one could not be carried out, the Court must put itself in the place of the testator, and consider which of the two he would have desired to take effect. The Court held that the words "issue male," &c., shewed a general intention that there should be an estate tail, and that, therefore, they must override the particular words which indicated only a life estate in George Grew. The testator used the word "issue" as indicating by its use what may be called a special intention, and therefore—that again being a case in which there were words which might be construed as a condition—the Court came to the conclusion that there was an estate tail in the devisee, who otherwise would have been only tenant for life.

Lastly, I wish to say a word about *Roddy* v. *Fitzgerald*. (2) I am not surprised to see that there, as Lord Wensleydale observed (3), the ten Irish judges were equally divided in opinion, and that the eight English judges would have been equally divided had not Martin B. been prevented from giving his opinion. And I doubt whether any ordinary man reading the

(1) 2 Wils. 322; Wilm. 272.
(2) 6 H. L. C. 823.
(3) 6 H. L. C. 876.

will in that case would have come to the conclusion at which the Court arrived. I do not think Mr. Vaughan Hawkins is quite justified in saying that that is an authority conclusive of the present case. But I think it is very important, because it shews how far the House of Lords thought it right to go in giving effect to the word "issue," and to words which would primâ facie confer an estate tail. I think, however, that Mr. Vaughan Hawkins is at any rate justified in saying that that authority does limit to a great extent the discretion of the Court as to the construction of the words "issue male"—words which are also found in the will now before us.

Now, that being the state of the authorities which Buckley J. has thought, and which I also think, are material as laying down the principles which should guide us, I will now state why I consider that this fifth codicil conferred a special estate tail on Lord Charles. It is certainly a curiously expressed codicil. But I think one answer to the main argument of Mr. Swinfen Eady is, that he assumed throughout that there is in the first instance a devise of the estates to the son Charles, and he severed that from the words which followed. He referred only indirectly to s. 28 of the Wills Act. I would observe in passing that that section only says that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." I think that the reasonable construction of this codicil is that which Buckley J. has given to it. The testator began by saying what he was going to do with his estates. He was going to devise them to his son Charles, and, of course, if that had stood alone, Charles would have taken them absolutely by reason of s. 28 of the Wills Act. Then there follow some intermediate words which (inter alia) provide that Lord Lincoln, the testator's eldest son, may purchase the estates. Then I think the scheme of the codicil is to go back again to what was to be done with the estates just referred to, because there is a direction that the

C. A. 1901 PELHAM CLINTON v. NEWCASTLE (DUKE OF). Lord Alverstone C.J.

purchase-money, which was to take the place of the estates, is "to go with the limitations of this will." I read that as taking up again the sentence which had been commenced with the words "I bequeath to Charles"—that is to say, "to my son Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants." It was not really disputed that those words would give an estate tail to the issue. The real question and the important question we have to consider is, Do those words create an estate tail in Charles? Speaking for myself, if the words had been "to my son Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants," and there had not been the previous gift to Charles, I think the plaintiff's case would have been hardly arguable. But, looking at the sentence as a whole, I think it is clear that the testator was speaking throughout of the limitations in his will, and intended to limit the estate which he bequeathed, or the money which represented the estate, to his son Charles and to his issue male, if he married a fit and worthy gentlewoman. In my opinion, therefore, the same line of reasoning which led the learned judges in the three cases to which I have referred to the conclusion that the words used were sufficient to confer an estate tail, is equally cogent to bring us to the conclusion at which Buckley J. arrived.

VAUGHAN WILLIAMS L.J. I have arrived at the same conclusion. The case is a difficult one, but after all we have only to construe the words of a particular will, and we have not, as I understand it, to lay down any general rule. That being so, I am content to deliver my judgment without any further consideration, and I give, as I think one ought to do in the construction of a will of doubtful terms, all weight to the conclusion of the judge of first instance, and I am not prepared here to differ from his conclusion. But I must say what Lord Cranworth said of will cases generally in *Roddy* v. *Fitzgerald* (1): "I must begin by saying that the decision of these

(1) 6 H. L. C. 871.

cases is never very satisfactory, because one cannot but feel that the real intention which the testator had in view is very frequently defeated instead of being carried into effect. But the duty of the Court is only to interpret the language of the will, attending to certain well-known rules or canons of construction." I have no inclination to favour such rules one jot more than previous authority compels me, for I am strongly of opinion that those rules constantly tend to prevent the Courts which have to construe wills from giving effect to the obvious intention of the testator, so far as words are concerned, if one leaves out of consideration the technical meaning or the technical canon of construction which judges have thought fit to adopt, and which very often is not present to the mind of the testator, even though his will may have been drawn with the assistance of a professional lawyer.

I make these observations, because I can hardly doubt that in the present case we shall by the conclusion to which we are coming defeat the manifest intention of the testator. Can any one doubt that the real object of this testator was to cut out of his inheritance a son of whose conduct he did not approve, and to substitute for him, one after the other, his younger sons, they and other descendants in succession taking estates tail, and only to let in, not the son of whose conduct he did not approve, but the children of that son after the failure of all the issue of all the other sons? That, so far as I can see, was the plain intention of this testator; and we are putting a construction upon this codicil which facilitates the happening of the very contrary, and has in fact led to the very contrary happening, because we are holding that all these estates tail might be barred by a disentailing deed in the way in which they have in fact been barred. By that means the general intention of the testator will be utterly defeated. But still, as Lord Cranworth says, the duty of the Court is only to interpret the language of the will according to certain well-known canons of construction, and we have to determine, according to those canons of construction, whether the children of Charles take as purchasers, or whether they take under the limitation created by the use of

C. A. 1901

PELHAM CLINTON v. NEWCASTLE (DUKE OF).

Vaughan Williams L.J.

the words "issue male." I base my decision on *Roddy* v. *Fitzgerald.* (1) I do not say that strong arguments might not be rested on the other authorities which have been cited, and my Lord Chief Justice has expressed his view to that effect. But I wish to say a word about *Page* v. *Hayward.* (2) There you start with the creation of a plain estate tail in Mary and the heirs male of her body, and then you go on and find words which not only primâ facie are conditions, but which by the very terms of the will are expressed to be conditions, and it was held notwithstanding that the express words were words of condition they should be taken to be a limitation. This, as it seems to me, was a very strong thing to do; but it must not be forgotten that there clearly was an estate tail immediately upon the death of the testator, and, therefore, the question was really, not whether there was a condition on the happening of which an estate tail was to come into existence, but whether there was a condition which was to defeat the estate tail already created. And the third resolution of the Court says "that the estate tail of Mary and Elizabeth, or either of them, does not cease by marrying one that is not a Searle." It is obvious, therefore, that there was an estate tail wholly independently of the words of that condition; and then the Court said, having got an estate tail wholly independently of that condition, you are to treat the words as words of limitation, and not as a condition. I do not say that this prevents the case from applying here. I have not thought it out sufficiently to enable me to say whether the terms of the resolution are such as to make the case one of general application. But that difficulty made me try to see whether there are not more cogent reasons which would lead me to the same conclusion.

With regard to *Roe* v. *Grew* (3), I think that Wilmot C.J. really decided it upon the intention of the testator. He pointed out that the testator had an inconsistent will, and that you could not carry it out as a whole. He then looked about for what he called the "general intention" and "the particular intention," and then he said that no one can doubt

(1) 6 H. L. C. 823. (2) 2 Salk. 570.
(3) 2 Wils. 322; Wilm. 272.

what that general intention was, and that you could not carry that intention out unless you construed the words so as to create an estate tail. That seems to me to be the meaning of the judgment of Wilmot C.J. And I observe that one of the learned judges who advised the House of Lords in *Roddy* v. *Fitzgerald* (1) speaks of the rule about inconsistent general and particular intentions as having been invented by Wilmot C.J. Then, having arrived at that conclusion, Wilmot C.J. said (2): "The word *issue* in a will, is either a word of purchase or of limitation, as will best effectuate the intention of the testator; it is a plural word, and takes *in* all the sons of George Grew, and the words '*issue male of his body and the heirs male of the body of such issue*' mean only that they were not all to take at a time" (that is, distributively), "but in succession, as if he had said *to his first and every other son*, &c."

I pass now to *Roddy* v. *Fitzgerald*. (1) As I understand it, that is a very strong case to shew that primâ facie the word "issue" is a word of limitation, and not a word of purchase. I so read the word here; and it seems to me that, when once it is read in that way and you add to it the subsequent clause, namely, "to my son Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants, in failure of which, &c.," it looks very much as if *Roddy* v. *Fitzgerald* (1) applied exactly. But Mr. Swinfen Eady says it does not, because although the word "issue" is used as a word of limitation, and it is necessary therefore to read "issue" exactly as if it were "heirs of the body," and although there is in this case, as in *Roddy* v. *Fitzgerald* (1), the addition of the provision "in failure of which," yet there the failure referred to was a general failure of issue, whereas here it is not a general failure, but a failure of a limited class of issue. I am afraid I do not quite follow that observation. I do not see anything in the limitation in this codicil which excludes the argument which would arise in the case of a general failure of issue. At any rate, I am quite clear that there is nothing in the words "issue male and their male descendants" which gives anything to Mr. Swinfen Eady's client as a

(1) 6 H. L. C. 823. (2) 2 Wils. 323. [The italics are in the original report.]

BIBL. LONDIN UNIV.

C. A. 1901

PELHAM CLINTON v. NEWCASTLE (DUKE OF).

purchaser. I have come to that conclusion upon consideration of the arguments which have been addressed to us.

I have only one more observation to make, and that is this. I do not myself read the words "to Charles if he marries a fit and worthy gentlewoman and has issue male" as creating a condition at all. It seems to me that those words as a whole are words of limitation and not of condition.

I do not think I can usefully add anything more.

ROMER L.J. I also think that Buckley J. has put a right construction upon this codicil, and I need only add a few remarks.

In the first place, I think that the reference in the codicil to the marriage of Charles with a fit and worthy gentlewoman is not a condition properly so called, and that Charles takes some estate in the property devised, whether he marries as mentioned in the codicil or not. *Page* v. *Hayward* (1) strongly supports that view—indeed, it was a much stronger case in that direction than the present.

Nor do I think that, according to the true construction of this codicil, there was a gift in fee to Charles, with an executory devise over in case he should marry as provided, and should leave male issue by that marriage. The codicil speaks of the various successive gifts as being "limitations," and, when the Court can give effect to such gifts by will as are found in this codicil by way of legal remainders, it will prefer to do so rather than to treat the gifts as arising by way of executory devise.

This being so, it appears to me that there are but two possible constructions of this codicil—first, that it created an estate in special tail male in Charles; or, secondly, that it created an estate to Charles for life, with remainder to his male issue by the marriage mentioned, as purchasers, in tail male. Of these two possible constructions, I think the first is the true one. By it you give effect to that which, as it appears to me, was the true intent of the testator, without adding or implying anything which does not appear on the

(1) 2 Salk. 570.

face of the codicil. I think the intent was to give, so far as possible, to Charles such an estate as would on his death, if he had married as mentioned, pass to his male issue by the marriage in the ordinary course of succession, and that it was only on the ultimate failure of that issue that the next gift was to take effect by way of remainder. In his limitations the testator uses the word "issue," which is a word of well-known legal import, and one peculiarly apt and proper to create an estate tail. Moreover, when the words of the gift in remainder to the testator's son Thomas, after the determination of the estate given to Charles and his issue, are considered, it is clear that the testator regarded the issue of Thomas by the marriage indicated as succeeding by virtue of the estate given to Thomas; and I think it is plain on the words of this codicil that, at any rate, the estate given to Thomas was an estate in special tail male. And I cannot suppose that the testator intended the estate which he gives to Charles to be different from that which he gives to Thomas, if Thomas should succeed.

On the other hand, the second construction which I have mentioned would give rise to considerable difficulties. In the first place, it is to be noticed that the testator does not expressly give to Charles an estate for life, and I do not think the Court ought to imply such a limitation when it is not obliged to do so. Whether, if the testator had used the words "estate for life" in describing the interest given to Charles, that would have been sufficient for the appellant's purposes, we need not consider. Secondly, though it is true that the testator speaks of the "male descendants" of the male issue of Charles by the particular marriage, and that it was unnecessary to do that if the gift was to Charles in special tail male, yet we know that testators do often add unnecessary words. And, if the testator in speaking of Charles' male issue intended to give them an estate tail as purchasers, the question would then arise, which of the issue were meant to be the purchasers. It is said that only the sons of Charles were so intended. But the testator has not said so, and I do not see why the Court should imply it unnecessarily. Nor do I think he can be

C. A. 1901 PELHAM CLINTON v. NEWCASTLE (DUKE OF). Romer L.J.

taken to have meant that all the male issue of Charles living at the time of Charles' death should be regarded as purchasers. He has not said so, and I do not think he could have intended both a son of Charles and that son's sons to take simultaneously as purchasers. Moreover, the gift over is on failure of all the male issue and their male descendants, and I do not see why the Court should be driven unnecessarily to imply cross-remainders in tail. I think that the limitations of this codicil are more simply and properly carried out by holding that there is a gift to Charles in special tail male, as Buckley J. has decided. It is true that, by reason of the fact that an estate tail can be barred, the testator's intention may in one sense be defeated, but that is only because such is the legal effect of an estate tail. The consideration that such an estate can be barred cannot possibly affect in the eyes of the Court the legal effect of the words which the testator has used in this codicil. For these reasons I agree in thinking that the appeal should be dismissed.

Solicitors: *Blair & W. B. Girling; Richard Smith & Sons, for Marshalls & Bate, East Retford.*

W. L. C.

LISLE *v.* REEVE.

[1900 L. 635.]

C. A. 1900 BUCKLEY J. *Nov.* 19, 20, 21, 29. C. A. 1901 *Nov.* 12, 14.

Mortgage—Clog on Redemption—Agreement subsequent to Mortgage—Option to Purchase Mortgaged Property—Conditional Sale.

On April 23, 1896, an agreement was entered into between the plaintiffs and the defendant by which the plaintiffs agreed to lend the defendant 5000*l.*, which was to be secured by a first mortgage of a ship belonging to the defendant, and was to be made payable six months from the date of the mortgage. If interest was regularly paid the plaintiffs were not to call in, and the defendant was not to compel them to receive, the principal before the expiration of two years from the date of the mortgage. If at any time within two years from April 23, 1896, the plaintiffs should elect to enter into partnership with the defendant, they were to be at liberty to do so, in which case they were to relieve the defendant from payment of the mortgage money, and transfer the ship free from the mortgage for the purposes of the partnership. The capital, of which the ship was to form part, was to belong to the plaintiffs and the defendant in equal shares.

On July 4, 1896, the defendant executed a statutory mortgage of the ship to the plaintiffs.

The plaintiffs did not within the two years elect to enter into partnership with the defendant, and no part of the 5000*l.* was paid.

On June 27, 1898, the defendant executed a mortgage to the plaintiffs of some wharves as a further security for 2000*l.*, part of the 5000*l.* By this deed the defendant covenanted for the repayment of the 2000*l.* on December 27, 1898, and there was a proviso for redemption upon payment on that day.

On July 9, 1898, another agreement was entered into between the plaintiffs and the defendant. It contained a recital of the agreement of April 23, 1896, and of the mortgages of July 4, 1896, and June 27, 1898; a recital that the plaintiffs had applied to the defendant for repayment of the 5000*l.*, and that he was unable to repay it; and that he had requested them to extend the term of two years for a further period of five years, which they had agreed to do upon the terms thereinafter appearing. It was then agreed and declared that, if at any time within the further period of five years the plaintiffs should elect to enter into partnership with the defendant, they should be at liberty to do so, in which case the plaintiffs were to release the defendant from payment of the 5000*l.*, and to transfer the ship free from the mortgage for the purposes of the partnership. The capital of the partnership, of which the ship was to form part, was to belong to the plaintiffs and the defendant in equal shares.

On February 24, 1900, the plaintiffs gave notice in writing to the defendant that they elected to enter into partnership with him. He

C. A.
1901
LISLE
v.
REEVE.

refused to allow them to do so; and they thereupon brought an action to compel specific performance of the contract constituted by the agreement of July 9, 1898, and the notice of February 24, 1900, or, in the alternative, payment of damages for breach of contract, in which case the plaintiffs claimed the right to enforce their securities for the 5000*l.* and interest.

The defendant alleged that the agreement of July 9, 1898, was invalid, because it clogged the equity of redemption; and by a counter-claim he asked that that agreement might be delivered up to be cancelled, and a declaration that he was entitled to redeem the securities:—

Held, by Buckley J., that the mortgage of June 27 and the agreement of July 9, 1898, formed really one transaction, but that, as the condition which gave the mortgagees an option in effect to purchase a moiety of the mortgaged property must be performed (if at all) before the legal right of redemption would arise, and consequently before there could be any equitable right of redemption, the transaction was valid as a conditional sale, and the rule against clogging an equity of redemption had no application:

Held, by the Court of Appeal, that the mortgage of June 27 and the agreement of July 9, 1898, were separate and independent transactions, and that, the fairness of the agreement of July 9 not being impeached, there was no reason why the mortgagor and the mortgagees should not subsequently to the date of the mortgage enter into an arrangement which might have the effect of depriving the mortgagor of his equity of redemption.

On this ground the decision of Buckley J. was affirmed.

But the Court of Appeal expressly stated that they must not be understood as assenting to the view of the law expressed by Buckley J.

TRIAL OF ACTION.

The following statement of the facts is taken in substance from the judgment of Buckley J.:—

By an agreement dated April 23, 1896, and made between the plaintiffs (who carried on business as Bentham & Co.) and the defendant, the plaintiffs agreed to lend the defendant 3000*l.*, and such further sums not exceeding 2000*l.* as the defendant should require, and these sums were to be a first mortgage on the defendant's steamship the *Norfolk*. The further advances were only to be made within two years from April 23, 1896. The 3000*l.* and further advances to be secured by the mortgage were to be made payable at six months from the date of the mortgage. The 3000*l.* was to bear interest at 5½ per cent. from that date. The further advances were to be free of interest. The plaintiffs were not to call in, and the defendant was not to compel the plaintiffs to receive, the principal moneys before the expiration of two years from the date of the mort-

gage, if interest was regularly paid. If, at any time within two years from the making of the agreement (April 23, 1896), the plaintiffs should elect to enter into partnership with the defendant, they were to be at liberty to do so, upon the terms that (inter alia) the plaintiffs should relieve the defendant from the payment of the 3000*l.* and further advances, if made, and, if the whole 2000*l.* had not been advanced, should make up the 2000*l.*, and the plaintiffs should transfer the ship free from the mortgage for the purposes of the partnership. The capital of the partnership was to be represented by the *Norfolk* and some other property described in a schedule to the agreement, and the ship and other property were to belong to the defendant and the plaintiffs in equal shares. They were to share the profits and losses of the partnership equally, and the partnership was to continue until determined by six months' notice on either side.

On July 4, 1896, the defendant executed to the plaintiffs a statutory mortgage of the *Norfolk* to secure an account current, the particulars of which were therein stated to be described in a receipt and agreement of even date. No date for payment was named in the mortgage. The receipt and agreement were introduced by reference. It appeared that there was a receipt or memorandum (not of even date), but dated July 16, 1896, which shewed that 3783*l.* was the amount in fact then advanced and secured by the mortgage, and Buckley J. held that this was the receipt referred to in the statutory mortgage. It fixed July 4, 1898, as the date for repayment.

There was also executed a deed of July 4, 1896, between the defendant of the one part and the plaintiffs of the other part, which, after a recital that the defendant (therein called "the mortgagor") was the owner of the ship *Norfolk*, and that he had applied to the plaintiffs (therein called "the mortgagees") for a loan of 5000*l.*, to be secured on the ship and her freight and insurances, and that he had by a deed-poll of even date mortgaged the ship to the plaintiffs, it was witnessed that the mortgagor assigned to the mortgagees all charterparties, bills of lading, and documents under which freight might be earned by the ship, and all policies of insurance of the ship, by way

C. A. 1901 LISLE v. REEVE.

of security, and he covenanted for payment of the 5000*l.* on demand.

In the opinion of Buckley J. all the instruments above stated formed part of one transaction, and he thought that it was unnecessary for the purposes of his judgment to comment upon the fact that in the receipt the obligation was to pay on July 4, 1898, while in the deed of covenant it was to pay on demand.

On April 23, 1898, the two years, within which the plaintiffs were under the agreement of April 23, 1896, entitled to elect to enter into partnership with the defendant, expired. They had not elected to enter into partnership. The whole sum of 5000*l.* had been advanced, but no part of it had been repaid. Under these circumstances Buckley J. was of opinion that there clearly existed, after April 23, 1898, the relation of mortgagor and mortgagee between the parties, so far as the transaction of 1896 was concerned. On July 4, 1898, there existed an equitable right in the defendant to redeem the plaintiffs.

In this state of things there was executed on June 27, 1898, an indenture between the defendant (therein called "the mortgagor") of the one part, and the plaintiffs (therein called "the mortgagees") of the other part, which, after a recital that the mortgagees had advanced to the mortgagor 2000*l.*, in consideration of which the mortgagor covenanted for payment of that sum on December 27, 1898, with interest at 5 per cent., the defendant conveyed to the plaintiffs by way of security some wharves at Norwich and at Great Yarmouth, subject to a proviso for redemption on payment of the 2000*l.* on December 27, 1898. This sum of 2000*l.* was part of the above-mentioned sum of 5000*l.*; and the deed of June 27, 1898, was a further security for part of the debt of 5000*l.*, and it gave time to the mortgagor, until December 27, 1898, for payment of the 2000*l.*

On the same June 27, 1898, the defendant executed to the plaintiffs a mortgage of a policy of assurance for 3000*l.* by way of security to them against a guarantee which they had given to the defendant's bankers for a sum of 1000*l.*, part of the defendant's overdraft.

On July 9, 1898, another agreement was entered into between

the plaintiffs and the defendant. This agreement contained an imperfect recital of the agreement of April 23, 1896; for, although it stated that under that agreement the further advances were to be made within two years from April, 1896, and that the election to enter into partnership was to be made within the same time, it did not state that under that agreement the loan was for a period of two years from July 4, 1896. There was then a recital that the plaintiffs had advanced to the defendant 5000*l.*, which had been secured by a first mortgage on the ship *Norfolk*, and by a second mortgage on the wharves, dated June 27, 1898 (this statement was inaccurate), and by an assignment of the policy for 3000*l.* (which was not the fact), and that the plaintiffs had not up to date entered into partnership with the defendant. Then followed a recital that "the said term of two years so fixed by the said agreement having on April 23 last expired, and Bentham & Co. having made an application to Reeve for the repayment of the said sum of 5000*l.* with interest thereon, and Reeve, not being in a position to comply therewith, has requested Bentham & Co. to extend the said term of two years for a further period of five years, which they the said Bentham & Co. have agreed to do upon Reeve entering into this agreement and paying interest upon the said sum of 5000*l.* or any further sums at 5*l.* per cent. per annum, upon the terms hereinafter appearing." It was then agreed and declared, that, if at any time within the said further period of five years from the making of this agreement, the plaintiffs should elect to enter into partnership with Reeve in his business, they should be at liberty to do so, and the partnership should be upon the terms thereinafter appearing. The plaintiffs were to release Reeve from payment of the 5000*l.*, and to transfer the ship free from the mortgage for the purposes of the partnership. Reeve was to satisfy all the liabilities of his business, and to be entitled to all book debts outstanding at the time of the partnership being entered into, but all current contracts were to be apportioned between Reeve and the new partnership. The capital was to be represented by the ships and the property set out in a schedule to the agreement, or other the ships and property used by Reeve in his business at

C. A. 1901 LISLE v. REEVE.

the time of the election, and the said ships and property were to belong to Reeve and Bentham & Co. in equal shares. Profits and losses of the new partnership were to be respectively divided and borne between Reeve and the plaintiffs in equal shares. The partnership was to continue until determined by six months' notice on either side, or for such term as the parties should agree. A partnership deed was to be settled; and Reeve was not during the period of five years to incumber or dispose of the property used in his business without the consent of the plaintiffs. In the opinion of Buckley J., the agreement of July 9, 1898, notwithstanding the form of the recital, extended the period of the loan for a further five years; and the mortgage of June 27, 1898, which had given six months from that date for repayment of the 2000*l.*, and the agreement of July 9, 1898, which gave five years, i.e., until July 9, 1903, for repayment of the whole 5000*l.*, and contained the terms of the new arrangement between the parties, formed in reality part of one transaction.

By a letter of February 24, 1900, the plaintiffs gave notice to the defendant that they elected to enter into partnership with him. The defendant refused to allow them to do so. The plaintiffs then brought this action to enforce specific performance of the contract constituted by the agreement of July 9, 1898, and the letter of February 24, 1900; and in the alternative they claimed damages for the breach of that contract; and in the latter case they claimed also payment of the 5000*l.* with interest; and to enforce their securities by foreclosure or sale. The defendant in his defence alleged that the effect of the agreement of July 9, 1898, was to render the mortgaged property or a moiety thereof irredeemable, and was an illegal clog on the equity of redemption. And he alleged that the agreement of July 9, 1898, was obtained from him at a time when he was to the knowledge of the plaintiffs in financial trouble; that the effect thereof was never explained to him by the solicitors who acted for the plaintiffs in the matter; that the defendant had no independent advice, and the same agreement was obtained from him by pressure, and that it was unfair and oppressive, and not binding on him.

By a counter-claim the defendant asked for a declaration that the agreement of July 9, 1898, was not binding on him, and that the same might be delivered up to be cancelled; a declaration that the registered mortgage of the ship *Norfolk*, the indenture of July 4, 1896, the mortgage of June 27, 1898, and the assignment of the policy of the same date, should stand as security only for the principal sum of 5000*l.*, with interest at 5 per cent. from December 31, 1899, to the issue of the writ in the action; and to redeem those securities.

The action came on for hearing before Buckley J. on November 19, 1900.

Astbury, Q.C., and *R. J. Parker*, for the plaintiffs. The defence set up to the plaintiffs' claim is that there is an illegal clogging of the equity of redemption.

In the first place, it was not illegal for the agreement of April 23, 1896, to preclude the mortgagor from redeeming before the end of two years: *Teevan* v. *Smith*. (1) At the expiration of that period the defendant, not being in a position to pay back the money borrowed, and no election by the plaintiffs to become partners having been made, further time was required, and further documents were executed. But the transaction then entered into was not a fresh mortgage; it was a mere extension of time for repayment upon certain terms. At the time when the agreement of July 9, 1898, was entered into the relation of mortgagor and mortgagees already existed, and the parties were at liberty to deal with one another as to the equity of redemption in any way they pleased: *Gossip* v. *Wright*. (2) No doctrine as to clogging is applicable in such circumstances. The mortgagor said, "I will give you an option of partnership in consideration of your extending the time for payment and postponing the exercise of your rights as mortgagees"; and those terms were accepted. The effect of the older reported cases is that a contemporaneous fetter on the right to redeem is bad, but that a subsequent agreement for an option to purchase is good. There was no bargain for a new mortgage or new loan in July, 1898; what took place was

(1) (1882) 20 Ch. D. 724, 729. (2) (1863) 32 L. J. (Ch.) 648.

C. A. 1901 LISLE v. REEVE.

a bargain on the top of an existing loan. The reasons why there was no clog on the equity are: (1.) Because the option to enter into partnership only existed while the mortgage was in an irredeemable condition—for no equity of redemption had then arisen or was in existence: *Santley* v. *Wilde*. (1) (2.) Because, even if the equity of redemption was operative during the five years, what was agreed upon would not prevent the mortgagor from redeeming. He may redeem, and he gets his property back; but he is personally liable to enter into a partnership, and by the partnership agreement the property becomes part of the partnership assets. This being a contract for partnership does not operate in rem but only in personam, and if the mortgagor will not put his property into partnership the mortgagees cannot have specific performance, and are only entitled to damages. There is no specific performance of an agreement to enter into partnership.

By July 9, 1898, the original option had gone, and nothing remained but the relation of mortgagor and mortgagees. Then came a new contract—not a new mortgage or a new bargain of loan—that five years' further time should be given with a new option of partnership.

The doctrine as to clogging the equity has within recent years been transformed—if that word is applicable where the effect of the decisions is to cause the doctrine, in cases where no separate equitable ground assists the mortgagor, to disappear. The old cases were supposed to have established: (1.) That the mortgagee was not entitled to bargain for any collateral advantage; that was demolished by *Biggs* v. *Hoddinott*. (2) (2.) That to make the mortgaged property irredeemable prior to the end of a fixed term of years was illegal. *Teevan* v. *Smith* (3) and other cases have disposed of that erroneous idea. (3.) That when the equity of redemption does arise or come into existence, the mortgagor cannot by any bargain contemporaneous with the mortgage be prevented from getting back his property unaltered and unfettered. For the purpose of a clog the equity is the right to get back the

(1) [1899] 2 Ch. 474. (2) [1898] 2 Ch. 307.
(3) 20 Ch. D. 724, 729.

property on the payment of so much money. There cannot be a clog till this right arises: *Santley* v. *Wilde*. (1) A bargain altering the nature of the transaction upon an event happening in the meantime is perfectly valid. A mortgage in which a time is fixed for redemption does not, by the rules of equity, become redeemable in this sense until that time has arrived: Fisher on Mortgages, 5th ed. p. 668; *Brown* v. *Cole*. (2)

[BUCKLEY J. referred to *Bovill* v. *Endle*. (3)]

The period for payment allowed by the mortgage may be altered by a deed of covenant so as to postpone the time for payment and the right to foreclose or sell till the death of the mortgagor: *Burrowes* v. *Molloy*. (4) If there was no right to foreclose, there would be no right to redeem in the absence of express stipulation for such a right. The contract may be such that the equity of redemption shall not arise until after the expiration of the whole of the mortgagor's term—which means that it shall never arise. Byrne J. so described the mortgage in *Santley* v. *Wilde* (5); and in *Rice* v. *Noakes & Co.* (6) Cozens-Hardy J. said that in *Santley* v. *Wilde* (5) the proviso for redemption was nugatory. In other words, it was an irredeemable mortgage.

In *Rice* v. *Noakes & Co.* (6) the mortgagor succeeded because the mortgagees were attempting to retain after redemption something which was more than a mere collateral advantage.

If there is anything in *Bonham* v. *Newcomb* (7) inconsistent with the other cases cited, that case cannot be relied on by the defendant; but the decision seems to be in the plaintiffs' favour.

[BUCKLEY J. It seems to mean that the transaction was not "once a mortgage."]

What is complained of here can only be put in force at a time when there is no equity of redemption.

The decision of the Court of Appeal in *Santley* v. *Wilde* (1) has been much misunderstood. A mortgage may be irredeemable

(1) [1899] 2 Ch. 474.
(2) (1845) 14 Sim. 427.
(3) [1896] 1 Ch. 648.
(4) (1845) 2 J. & Lat. 521.
(5) [1899] 1 Ch. 747, 761.
(6) [1900] 1 Ch. 213, 218; on appeal [1900] 2 Ch. 445.
(7) (1681) 1 Vern. 7; (1683) 1 Vern. 214; (1684) 1 Vern. 232.

C. A. 1901 LISLE v. REEVE.

although, in a sense, there is an equity of redemption, e.g., a mortgage of an annuity to secure an annuity. *Santley* v. *Wilde* (1) means that when you have security for a contract extending over the whole life of the property, there is not a clog merely, because you can never say, "Here is your money; give me back my property."

The Statute of Limitations would run from the mortgage of 1896, and in 1898 the defendant sold to the plaintiffs a right to part of his property on certain terms including forbearance by them and the release of the mortgage debt. Is there any objection because what is sold is an option to become a partner and that the consideration is the continuation of an existing loan on mortgage? Certainly, if the relation of mortgagor and mortgagee is ended, there is no clog.

In no reported case has there been held to be a clog where there was no equity to say, "Take your money and give me the property."

The provision as to partnership indirectly facilitates redemption, for if it is a transaction of mortgage the defendant has the right to have his property back, and if he does not fulfil his agreement the plaintiffs are entitled to damages. The case may be put as one of conditional sale. An agreement made, upon an advance of money, to convey property, and containing a power of redemption within a given time, and providing that in default the sale is to be absolute, is a conditional sale and not a mortgage: *Perry* v. *Meddowcroft*. (2)

H. Terrell, Q.C., and *Martelli*, for the defendant. If there is a clog on the equity, it is immaterial that it is created by a separate instrument, provided it is part of the same transaction. If the original term giving an option was invalid, the new agreement for an option was invalid.

If a mortgage is made redeemable at a certain day, a stipulation that if the mortgage money is not then paid the mortgagee may, by paying a further sum, turn his mortgage into an absolute purchase cannot be enforced so as to bar redemption: *Price* v. *Perrie* (3); *Willett* v. *Winnell* (4); *In re Edwards'*

(1) [1899] 1 Ch. 747, 761.
(2) (1841) 4 Beav. 197.
(3) (1702) Freem. Ch. 258.
(4) (1687) 1 Vern. 488.

Estate (1); *Jennings* v. *Ward*. (2) The judgments do not distinguish between a right to purchase before and a right to purchase after the equity of redemption attaches. The law will not allow a contemporaneous instrument to turn a mortgage into what is in effect a foreclosure decree, whether the instrument is executed before or after the period for redemption has arrived. The present case is not inconsistent with *Santley* v. *Wilde* (3), and it is within the broad principle long since laid down, and emphasized by *Rice* v. *Noakes & Co.* (4), that what is once a mortgage is always a mortgage.

The transaction must be looked at as a whole in order to see whether it was a mortgage transaction or not: *Salt* v. *Marquess of Northampton*. (5) This was all one transaction, and constituted a mortgage. It was not a merely personal contract. At all events, in respect of the wharves it gave a right in rem.

This was a collateral agreement which deprived the mortgagor of his equity of redemption. The fact that the option is to be exercised before the period fixed for redemption is immaterial. It would admittedly be invalid if it came into operation after that time, because it would prevent the mortgagor from redeeming at the date fixed or within the time allowed by equity, and an option to be exercised before that time has precisely the same effect. The right of redemption exists from the moment when the mortgage was made. The security is redeemable on payment of the debt, and the right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged: *Brown* v. *Cole* (6); *Burrowes* v. *Molloy*. (7) Before the time limited for payment the relation of mortgagor and mortgagee cannot be disturbed: *Bovill* v. *Endle*. (8) There cannot be a series of deeds which at the option of either party may constitute either a purchase or a mortgage: *Howard* v. *Harris* (9); Ashburner on Mortgages,

(1) (1861) 11 Ir. Ch. Rep. 367.
(2) (1705) 2 Vern. 520.
(3) [1899] 1 Ch. 747.
(4) [1900] 1 Ch. 213; on appeal [1900] 2 Ch. 445.
(5) [1892] A. C. 1.
(6) 14 Sim. 427.
(7) 2 J. & Lat. 521.
(8) [1896] 1 Ch. 648, 651.
(9) (1683) W. & T. 7th ed. vol. ii. p. 11; 1 Vern. 190.

C. A. 1901 LISLE v. REEVE.

p. 272, par. 4. No irredeemable interest was created in *Santley* v. *Wilde*. (1) Such a contract as this cannot be the foundation of a claim for damages: *Santley* v. *Wilde*. (2)

[In the course of the trial the defendant's counsel withdrew the charge of oppression and unfairness, and admitted that the agreement of July 9, 1898, was a fair one.]

Astbury, Q.C., in reply. There is no rule that a mortgagor is entitled to get back exactly what he mortgaged; the security may be of a wasting nature.

[BUCKLEY J. But the change in that case is not caused by the act of the parties.]

There is no right of redemption in an ordinary mortgage before the time fixed. At law the property belongs to the mortgagee subject to defeasance. Equity has nothing to do with it till the end of the six months, when the legal right arises which equity extends. An ordinary mortgage is a conditional sale for the first six months, and the rule as to clogging the equity of redemption does not apply. It does not apply if there is any doubt whether the transaction is a mortgage. The doctrine of "Once a mortgage always a mortgage" depends upon the transaction being a mortgage ab initio. Here it depended upon a subsequent condition whether the transaction ever became a mortgage or not. There is no rule against inserting a condition subsequent in a proviso for redemption. A contractual right to redeem is not the same as an equity of redemption. This contract provides that in a certain event the transaction shall not be a mortgage. It states that the security is of a fluctuating character. This never was a mortgage, and there never has been any right to redeem.

Cur. adv. vult.

1900. Nov. 29. BUCKLEY J., after stating the facts in substance as above, continued:—The question I have to determine is, what is the true effect of the agreement of July 9, 1898.

The plaintiffs contend that no question as to a clog on the equity of redemption arises, because the transaction of July 9,

(1) [1899] 2 Ch. 474. (2) [1899] 1 Ch. 747.

1898, was not a mortgage transaction at all. They say that at the date of the execution of the agreement of July 9, 1898, there existed certain securities in respect of which the plaintiffs and defendant stood towards each other in the relation of mortgagees and mortgagor, that mortgagee and mortgagor may by any arrangement made after the execution of the mortgage enter into any arrangement as to the equity of redemption which they think proper (*Gossip* v. *Wright* (1)), and that the arrangement of July 9, 1898, was of that character.

They contend that the real question for consideration is whether the transaction was, in the events which happened, a conditional sale, which by the performance of the condition became a sale, or was a mortgage. They contend that it was the former.

The proposition, broadly stated, which the plaintiffs put forward is—that if a contract, as to which a question arises whether it is a mortgage or not, includes a condition subsequent which is to be satisfied, if at all, before the right of redemption arises at law, and upon whose satisfaction there is never to be any right to redeem at law, then the transaction is in fact a conditional sale, and there is no equity of redemption which can be clogged, because there was in the events which happened never any right to redeem at law. They say that it is only upon default of satisfaction of the condition within the time that the transaction becomes a mortgage transaction. In other words, that if the condition is satisfied, then the instrument is never "once a mortgage" for the purposes of the maxim, "Once a mortgage always a mortgage."

The operation of the agreement of July 9, 1898, seems to me to have been this—the plaintiffs were then the holders of the statutory mortgage of July 4, 1896, upon the *Norfolk*, and the second mortgage of June 27, 1898, upon the wharves. Those stood as security respectively for 5000*l.* and for 2000*l.*, part of the 5000*l.*, moneys lent by the plaintiffs to the defendant. For repayment of those moneys the plaintiffs gave time until July 9, 1903, and until that date arrived there could be no default by the defendant in payment of the money at the

(1) 32 L. J. (Ch.) 648.

C. A. 1901 LISLE v. REEVE. Buckley J.

time fixed by the contract. In other words, there could not until July 9, 1903, arise in the plaintiffs, if the transaction was a mortgage, an absolute right to the property at law, or any right in the defendant subsequently to redeem in equity. If during the currency of this period of five years, i.e., before July 9, 1903, the plaintiffs did (as in fact they did in February, 1900) elect to enter into partnership with the defendant, then the debt of 5000*l.* and interest was to cease to exist, and the properties mortgaged and other properties were to become assets of a partnership in which the plaintiffs and defendant were to be interested in equal shares. The substance of this is that in this event the plaintiffs by becoming partners were to become purchasers from the defendant of one-half of the properties included in the mortgages, and the purchase-money was to be the 5000*l.* and interest. If they availed themselves of this option there could be no right to redeem at law, for no right of redemption arises till 1903, and before that time arrives, the condition being satisfied, the purchase has taken effect. The question is whether such a condition is valid.

Now, the plaintiffs argued that the transaction of 1898 could not be a transaction between mortgagor and mortgagee, for that the loan of 5000*l.* was not then made, but had been made long previously, and the bargain was only one for giving time for the payment of an existing loan. I do not accede to this argument. I think that the same principles must apply where an existing mortgage is used as security for new terms of a bargain of loan as where a mortgage is then executed for the first time. But then the plaintiffs say—assume that this was a mortgage transaction, still it was subject to a condition, and it is valid in a mortgage transaction to introduce a condition subsequent to be satisfied, if at all, before the time arrives at which the estate becomes absolute at law, and which, if satisfied, makes the transaction a sale and not a mortgage, and that this is a case of that sort.

[In that which follows I am not addressing myself to the case of a mere equitable charge where the right of redemption is equitable from the first, but to the case of a legal mortgage

(which this is) with a legal right to redeem at a defined time. (1)]

Now, an equity of redemption is a right upon equitable terms to redeem after the legal time for redemption has expired, and after the estate has become absolute at law. An equity of redemption is an equitable right additional to and superimposed upon the legal right to redeem. When the estate has become absolute at law equity intervenes, and says that even then the estate which has become absolute at law is meant to be, and ought to be treated as being, a security only. If, however, there is no legal right of redemption, there is no right which equity can extend. In other words, an equity of redemption can never exist unless there exists a legal right of redemption.

To ascertain, therefore, whether there is an equity of redemption, the first step is to ascertain whether according to the contract, and having regard to all the terms of the contract, there is a legal right of redemption. If there is not, then the transaction is not a mortgage for the purpose of the maxim, "Once a mortgage always a mortgage."

It seems to me that the terms of the contract as to a legal right of redemption may include a condition subsequent so expressed as that, if the condition is satisfied before the date for legal redemption arrives, there shall be no right of redemption at law.

Thus, suppose that A. lends 1000*l.* to B. upon a covenant by B. for repayment with interest at 5 per cent. at the expiration of six months, with an agreement that if A. at any time within three months elects to purchase Blackacre for 1000*l.* and interest to date, then A. shall be entitled to become such purchaser, and the loan and interest shall be set off against the purchase-money, but that in default of such notice A. shall be entitled to a charge on Blackacre for the loan and interest, and B. will on demand execute to him a legal mortgage with a proviso for redemption on payment of the loan and interest at the expiration of the six months. Then suppose that A.

(1) The words in square brackets were added by Buckley J. in revising the print of this judgment.

C. A. 1901 LISLE v. REEVE. Buckley J.

within the three months gives the notice. In such a case, by the terms of the bargain, there never has arisen in B., according to the stipulations of the contract, any legal right to redeem, because before the end of the six months the estate has by purchase become the property of A., and the debt has been extinguished.

Then suppose the transaction takes the form of an ordinary mortgage by covenant for payment at the expiration of six months, and a conveyance subject to a proviso for redemption at the end of the six months, but with a stipulation that if A. at any time within the six months elects to purchase as above he shall be entitled to do so, and the debt shall be set off against the purchase-money. I do not see that this differs from the former case. In this latter case, again, no right of redemption ever arises under the contract. There is nothing to which equity can add a larger right of redemption.

The case seems to me to differ totally from a case in which the bargain is that if B. does not redeem at the end of six months he shall not redeem at all. In that case there is a legal right of redemption, and equity will not suffer a contract which provides that the legal right shall be exercised according to its terms or not at all. But a contract which is that in a certain event there shall be no right to redeem at law seems to me to be good. It is a conditional sale.

It seems to me, therefore, that the proposition is well founded that if, by a condition subsequent contained in the instrument and which is to be performed at a time before the legal right of redemption arises, the lender may at his option become, and does by exercise of the option become, purchaser, so that the date for redemption at law never arrives, then there is no legal, and consequently no equitable, right of redemption. In such case the transaction is valid as a conditional sale, and the doctrine of clogging the equity of redemption can have no operation.

Now that, as it seems to me, is the present case. The defendant, according to the terms of the bargain, could never have redeemed adversely to the plaintiffs before 1903. In 1900 the plaintiffs availed themselves of an option by which

they became in substance purchasers of half the property included in the security upon the terms that the debt should be released. It seems to me that this is valid as a conditional sale. Under these circumstances the question of clogging the equity of redemption does not arise.

What, then, is the relief to which the plaintiffs are entitled? They stand, in my judgment, in the position of purchasers who have paid their purchase-money and whose vendor refuses to convey. The effect of his refusal was not to remit the parties to the position in which they would have stood if the option had never been exercised, so that the plaintiffs reverted to the position of lenders of a loan not to be paid off or called in till 1903, with rights of foreclosure and redemption to arise at that date, nor to give the plaintiffs a present right of foreclosure, nor the defendant a present right of redemption, but was to give to the plaintiffs the rights of purchasers who have paid their purchase-money and whose vendor refuses to convey. Their right is, I think, to repayment of the purchase-money and damages for breach of the contract. The purchase-money is 5000*l.* with interest at 5 per cent.; but there ought not to be added to this amount six months' interest in lieu of notice or mortgagees' costs—for the right of the plaintiffs is not as mortgagees, but as purchasers.

The defendant delivered his defence on May 17, 1900, and by paragraph 4 pleads that he brings 5125*l.* into court in satisfaction. All interest on the 5000*l.* has been paid to December 31, 1899. This 5125*l.*, therefore, was at the date of the payment into court sufficient to answer the purchase-money as consisting of 5000*l.* and interest from December 31, 1899. The plaintiffs sue for specific performance or damages. They do not ask for specific performance, but ask for damages. They are entitled, I think, to an order for payment out of court of the 5125*l.*, and an inquiry as to damages. The defendant is, I think, entitled to an order for reconveyance of the properties comprised in the statutory mortgage of July 4, 1896, and in the second mortgage of the wharves of June 27, 1898. I say nothing about the mortgage by assignment of the policy for 3000*l.*—that was security for another debt, namely, the

C. A. 1901 LISLE v. REEVE. Buckley J.

guarantee of the overdraft. The judgment, therefore, which I pronounce is a declaration that upon February 24, 1900, the plaintiffs became entitled to enter into partnership with the defendant upon the terms of the agreement of July 9, 1898, and that the refusal of the defendant to enter into that partnership was a breach of the agreement. An order for payment out of court to the plaintiffs of the sum of 5125*l.* paid into court by the defendant. An inquiry as to damages sustained by the plaintiffs by breach of the contract. An order for reconveyance by the plaintiffs to the defendant of the properties comprised in the mortgage of July 4, 1896, of the *Norfolk*, and the second mortgage of June 27, 1898, of the wharves.

It remains to deal with the costs of the action. The whole question between the parties was whether the plaintiffs were right in suing for breach of the contract of July 9, 1898, or whether the defendant was right in saying that that agreement was not binding on the parties, and ought to be delivered up to be cancelled. In this contest the plaintiffs have succeeded and the defendant has failed. I think the costs must follow the event, and that the defendant must pay the costs of the action and counter-claim.

F. E.
H. C. R.

C. A.

The defendant appealed. The appeal came on for hearing on November 12, 1901.

Warmington, K.C., and *Martelli*, for the defendant.
Astbury, K.C., and *R. J. Parker*, for the plaintiffs.

It is considered unnecessary to report the arguments, inasmuch as the arguments in the Court below are fully reported, and the decision of the Court of Appeal turned upon their view of the facts.

In addition to the cases cited in the Court below, the following authorities were referred to: *Casborne* v. *Scarfe* (1); *Exton* v. *Greaves* (2); *Toomes* v. *Conset* (3); *Spurgeon* v.

(1) (1737) 1 Atk. 603. (2) (1682) 1 Vern. 138.
(3) (1745) 3 Atk. 261.

Collier (1); *Seton* v. *Slade* (2); *Carritt* v. *Bradley* (3); *Bowen* v. *Edwards*. (4)

VAUGHAN WILLIAMS L.J. The long and interesting discussion to which we have listened about clogging an equity of redemption has been in the result quite useless, because, as I understand this case, it turns upon a question of fact, or rather upon our view of a state of facts which in substance is not in dispute. I did not understand the defendant's counsel to dispute that it is competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain. The mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent to and independent of the original bargain.

In the present case it was certainly held by Buckley J. that the mortgage transaction of June 27 and the agreement of July 9, under which the option was given to the mortgagees to purchase the equity of redemption by entering into a partnership with the mortgagor, were one and the same transaction. It is now, however, admitted that there is no evidence of this except the documents themselves; and if one looks at the documents there is nothing in them to shew that the arrangement contained in the agreement of July 9 was contemplated by or was part and parcel of the mortgage of June 27. I come, therefore, to the conclusion that this finding of fact by Buckley J. cannot be supported. Indeed, it is not even alleged in the defendant's pleadings that these two transactions of June 27 and July 9 were part and parcel of one transaction. Taking it, then, that these two transactions were really separate and independent, what is the objection which is made to the

(1) (1758) 1 Eden, 55, 59.
(2) (1802) 7 Ves. 265, 273; 6 R. R. 124.
(3) [1901] 2 K. B. 550.
(4) (1661) 1 Rep. Ch. 221.

C. A. 1901 LISLE v. REEVE. Vaughan Williams L.J.

agreement of July 9? It appears to me that nothing can be said against it if it is really separate from and independent of the mortgage of June 27. The agreement of July 9 was an agreement for the purchase of an option to enter into partnership, and to buy in that way the equity of redemption by including the subject-matter of the mortgage in the property of the partnership proposed to be entered into between the mortgagor and the mortgagees.

I wish to add that I do not quite understand some observations in the judgment of Buckley J. about the time at which an equity of redemption is, if I may so say, first to be recognised. The learned judge said: "Now an equity of redemption is a right upon equitable terms to redeem after the legal time for redemption has expired, and after the estate has become absolute at law. An equity of redemption is an equitable right additional to and superimposed upon the legal right to redeem. When the estate has become absolute at law equity intervenes, and says that even then the estate which has become absolute at law is meant to be, and ought to be treated as being, a security only. If, however, there is no legal right of redemption, there is no right which equity can extend. In other words, an equity of redemption can never exist unless there exists a legal right of redemption. To ascertain, therefore, whether there is an equity of redemption, the first step is, to ascertain whether, according to the contract, and having regard to all the terms of the contract, there is a legal right of redemption. If there is not, then the transaction is not a mortgage for the purpose of the maxim 'Once a mortgage always a mortgage.'" Speaking for myself, I must say that I cannot accept that proposition. It is not necessary for the present purpose to go further into this matter. But I think it right to say that I cannot as yet agree with the proposition of law there laid down, and, in the course of the long argument we have heard, no authority which supports that proposition has been cited to us.

ROMER L.J. I agree in thinking that this appeal should be dismissed. The question turns entirely upon the agree-

ment of July 9, 1898. It is to be noticed that it is not now even alleged that that agreement was unconscionable or unfair, and the sole question is whether there is any principle of law which prevents it from being enforceable in this Court. In my opinion, under the circumstances, and looking at the provisions of the agreement, there is no rule of law or equity which prevents its being enforceable. The cases which have been cited, and the principles which have been referred to about "clogging" the equity of redemption, and the maxim "Once a mortgage always a mortgage," have, in my opinion, no application to the present case. What, then, was the agreement between the parties? It is true that they occupied the position of mortgagor and mortgagee. But that of itself does not necessarily render unfair or impeachable a contract bonâ fide made between them, if in other respects it is unobjectionable. The agreement of July 9, as I understand its terms, amounts to this. The mortgagor was carrying on a business. As between the parties to the agreement, there is given to the mortgagees an option of becoming partners with the mortgagor in the business within a period of five years from the date of the agreement. If the option is exercised within that period, the mortgagees are then to pay a sum of money to the mortgagor as their share of the capital of the business, and that sum is fixed at 5000*l.*, which was the amount due on the mortgage. The 5000*l.* so to be brought in will, if it is brought in and if the partnership is established, be applied in discharging the mortgagor from his liability under the mortgage. The agreement further provides that, pending the exercise of the option, the mortgagees will not call in the mortgage money. Now, admitting that that was a bonâ fide transaction, and not merely colourable to prevent the mortgage debt from being paid off and the mortgaged property redeemed (and there is nothing in the facts to justify such a conclusion), what is there in any rule of law to prevent persons who occupied such a position from entering into such a contract? In my opinion, there is nothing. Putting aside, of course, the provision that the mortgagees shall not insist upon being paid the mortgage debt

C. A. 1901 LISLE v. REEVE. Romer L.J.

during the fixed period, there is obviously nothing on the face of the agreement against which a word can be said. Is such an agreement bad because the mortgagee contracts that, pending the exercise of his option to enter into partnership with the mortgagor, the mortgagee will not call in his money, or that that forms part of the consideration for the partnership agreement? I think not. We are dealing with a transaction which, as I have pointed out, is not impeached as being in itself unconscionable or unfair; and it seems to me impossible to say that there is any rule which would invalidate this agreement, honestly come to and on the face of it fair. On this ground I think the appeal should be dismissed.

I only desire to add that it must not be understood that, in affirming the decision, I am indorsing everything which was said by the learned judge in the Court below.

COZENS-HARDY L.J. I agree. I desire to adopt the language of Kindersley V.-C. in *Gossip* v. *Wright*. (1) He said (2): "In that which is to be a mortgage transaction, that is, a security, the Court will not allow the right of redemption to be crippled and hampered by any arrangement between the parties at the time. That is well established as a general rule. I need not say, like any other general rule, that even that broad rule is liable to some exceptions. For example, there are one or two cases of this sort; one where the object of the transaction was not merely a loan of money, but one party meant to benefit the other. It was a sort of settlement between relations; and then the Court, although it did cripple the right of redemption, upheld the transaction. However, there is no doubt that the broad rule is this: the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security, either by any contemporaneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction. That the Court will allow the parties by a subsequent arrangement to enter into a

(1) 32 L. J. (Ch.) 648. (2) 32 L. J. (Ch.) 653.

transaction by which the mortgagor sells or releases, or conveys or gives up (call it what you will) his equity of redemption, and makes the estate out and out the estate of the mortgagee, is clear." Now, applying that principle to the present case, and in the absence of either allegation or evidence that the two deeds of June and July, 1898, were part of the same transaction, the agreement of July 9, as it seems to me, comes simply to an arrangement between a mortgagor and a mortgagee made subsequent to the mortgage, that the mortgagee shall have an option to purchase the equity of redemption. And, so far as I know, there is no authority which shews that there is any objection to such a contract between mortgagor and mortgagee, not as part of the original mortgage transaction, but at a subsequent time.

This being so, I desire only to say for myself that I entirely adopt the expressions of my brother Vaughan Williams L.J., and also that, subject to the effect of any further argument which Mr. Parker, whom we have not heard, might have adduced, if I had come to the conclusion that the two agreements formed really one transaction, I should not have been able to adopt the conclusion at which Buckley J. arrived.

Solicitors: *Cattarns & De Vesian; Rowcliffes, Rawle & Co., for Alfred Appleby, Newcastle-upon-Tyne.*

W. L. C.

FARWELL J.
1901
Nov. 13.

In re RICHARDS.
UGLOW *v.* RICHARDS.

[1901 R. 580.]

Will—Absolute Gift—Property or Power—Gift of Income—Life Tenant—Power to use Capital if Income not "sufficient"—Power of Appointment.

Bequest of the income of an estate to testator's wife for life with a direction that "in case such income shall not be sufficient she is to use such portion of" the capital "as she may deem expedient." On wife's decease "what is left" of the capital to be divided among certain residuary legatees:—

Held, that the wife has a general power of appointment over the capital during her life.

Re Pedrotti's Will, (1859) 27 Beav. 583, distinguished.

Whether the wife can appoint by will, *quære*.

ORIGINATING SUMMONS.

By his will, dated July 9, 1898, the testator Richard Richards provided as follows: "I give the income of all my real and personal estate and effects to my wife Jane Richards for her life, and also direct that in case such income shall not be sufficient she is to use such portion of my said real and personal estate as she may deem expedient. I direct that on my said wife's decease what is left of my said real and personal estate and effects shall be divided" among certain residuary legatees.

The testator died on August 12, 1900.

This summons was issued to determine what interest (if any) the wife took in the capital of the estate.

Austen-Cartmell, for the executor.

Jenkins, *K.C.*, and *Ashton Cross*, for the wife. There is no absolute gift of the capital to the wife, but she has a general power of appointment by deed or will exercisable at her own discretion.

W. H. Cozens-Hardy, for the residuary legatees. The wife is only entitled to use so much of the capital as with the

income is sufficient to afford her a maintenance suitable to her station in life: *Re Pedrotti's Will.* (1)

FARWELL J. Unless I am bound by *Re Pedrotti's Will* (1), I have no doubt that the wife has a general power of appointment over the capital during her life. Now, *Re Pedrotti's Will* (1) is distinguishable on the following grounds. In that case the words following the bequest of income to the life tenant were: "And I further devise, in case anything should occur *that her income is not sufficient*, she shall be at liberty to go to the principal." In the present case they are: "And also direct that in case such income shall not be sufficient she is to use such portion of my said real and personal estate as she may deem expedient."

In neither case does the testator define the limits of the ambiguous word "sufficient."

In *Re Pedrotti's Will* (1) Romilly M.R. held on the construction of that particular will that the word "sufficient" meant in effect "sufficient for the widow's wants," so as to afford her a maintenance suitable to her station in life. He impliedly held that no part of the capital was given to her, and that she had no general power of appointment such as, according to the report, she had attempted to exercise. The ambiguity of the word "sufficient" is the real distinction between that case and the present. It may either mean "sufficient for her wants" or "sufficient for her desires." In *Re Pedrotti's Will* (1) there was nothing to indicate which meaning was intended, and the more limited meaning was applied.

In the present case the wife is to use such portion of the capital "as she may deem expedient," and not merely such portion as may be sufficient for her wants or maintenance, and it really is left to her to say whether the income is sufficient or not.

The words "in case such income shall not be sufficient," though apparently contingent, are not really so in this will. They are merely introductory to and expressive of the motive for the words "she is to use such portion of my said real and

(1) 27 Beav. 583.

FARWELL J. 1901 RICHARDS, *In re.* UGLOW *v.* RICHARDS.

personal estate as she may deem expedient," and the whole clause means that if the wife deems it expedient to add anything to her income she may take it out of capital. That the words "in case such income shall not be sufficient" are not necessarily contingent may be illustrated by such cases as *Greetham* v. *Colton* (1), where a charge of debts upon a testator's real estate, "in case his personal estate shall be insufficient for the payment of his debts," was held an unconditional charge. Of course this is only an illustration, and perhaps not very germane to the present case, in which there is clearly no real contingency. The apparent contingency depends simply on the will of the wife, and not, as in *Re Pedrotti's Will* (2), on the occurrence of some extraneous event not indicated by the testator. I therefore hold that the wife has a general power of appointment over the capital during her life; but I express no opinion on the question whether she can exercise it by will. That point can be decided when it arises.

Solicitors: *Robbins, Billing & Co., for Marrack, Nalder & Hockin, Truro; Kingsford, Dorman & Co., for E. Laurence Carlyon, Truro.*

(1) (1865) 34 Beav. 615.

(2) 27 Beav. 583.

G. R. A.

In re JOPLIN BREWERY COMPANY, LIMITED.

BUCKLEY J.

1901

Oct. 25, 29.

Practice — Company — Debentures — Registration — Extension of Time — Protection of Creditors—Companies Act, 1900 (63 & 64 *Vict.* c. 48), *ss.* 14, 15.

An order under s. 15 of the Companies Act, 1900, extending the time for registration of debentures ought to contain the words: "but that this order be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

MOTION by the company that the time for the registration of second and third mortgage debentures might be extended, under s. 15 of the Companies Act, 1900, until one calendar month from the date of the order to be made on the motion. Practically the whole of the shares and debentures of the company, which was a family business, belonged to a few persons, all of whom supported the application; the company was entirely solvent; and the omission to register the debentures had been due to the illness of one of the directors.

A. L. Ellis, for the motion.

BUCKLEY J. made an order extending the time for fourteen days, subject to the production of a further affidavit.

On October 29 the matter was mentioned again, when his Lordship said that the 14th section of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), was in pari materiâ with s. 15 of the Companies Act, 1900, and that orders for extension of time under the latter section ought to be made in the same form as those under the former, namely, without prejudice to the rights of creditors acquired before actual registration.

A. L. Ellis submitted that, if there had been an accidental omission to register, the applicants were by the language of s. 15 entitled to an extension notwithstanding the creditors; the object was that the debenture-holders should not be prejudiced by the slip; and the Bills of Sale Act did not apply to

BUCKLEY J. 1901 JOPLIN BREWERY COMPANY, LIMITED. *In re.*

investments in the nature of debentures. But, in the peculiar circumstances of this company, he was not concerned to argue against the proposed addition to the order.

BUCKLEY J. Sect. 14 of the Bills of Sale Act, 1878, contains a clause enabling a judge to extend the time for registration of a bill of sale where there has been accidental omission to register within due time. It is the practice in judges' chambers in making orders under this section to introduce the words: "but that this order be without prejudice to the rights of parties acquired prior to the time when the bill of sale is actually registered"; and these orders are made readily upon proper evidence of accident or inadvertence for the reason that by the insertion of these words the rights of absent parties are not affected. The application before me on Friday last was made under s. 15 of the Companies Act, 1900, which is a provision of similar import to s. 14 of the Act of 1878, although the language is wider. The words in s. 14 of the Bills of Sale Act are: "Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct." Sect. 15 of the Companies Act, 1900, is: "A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief may, on the application of the company or any person interested, and

on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified." The language of the latter section is larger than that of the former, but I do not see that the variance makes any difference to the point with which I have to deal. Under s. 14 of the Companies Act, 1900, a security if not registered within a given time is void as against the liquidator and any creditor of the company. These applications are made without serving the creditors, and the orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale. I therefore direct that there be added to the order the words: "but that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered"; and I intimate my opinion that these words ought to be added in every case, unless there is some good ground to the contrary—e.g., in cases in which the order could not prejudice the rights of any creditors.

Solicitor: *L. W. Byrne, for G. N. Joplin, Liverpool.*

H. C. R.

BUCKLEY J.

1901

Oct. 29.

DAVENPORT *v.* MARSHALL.

[1901 D. 974.]

Husband and Wife—Settlement—Construction—After-acquired Property—Covenant—"During the Marriage"—Judicial Separation—Property acquired during Separation—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 25—*Matrimonial Causes Act*, 1858 (21 & 22 *Vict. c.* 108), *s.* 8.

A marriage settlement contained a covenant to settle all property to which the wife or her husband in her right should, during the said intended marriage, become beneficially entitled in possession or reversion. A judicial separation was subsequently decreed between the husband and wife. At the date of the settlement the wife was entitled to a reversionary interest, which fell into possession during the separation; and she became entitled during the separation to some personal property under the will of her mother:—

Held, that the reversionary interest was bound by the covenant; but that the property acquired during the separation was not bound, because the object of the covenant was to exclude the husband, and, inasmuch as he was excluded by s. 25 of the Matrimonial Causes Act, 1857, the covenant was inoperative during the separation.

SPECIAL CASE.

On October 8, 1868, a settlement was executed on the marriage of Edward Marshall and Rosa Louisa Davenport which contained a covenant that, "in consideration of the said intended marriage, each of the said Edward Marshall and Rosa Louisa Davenport doth hereby for himself and herself and his and her heirs, executors, and administrators, covenant with the trustees and with each of them that all real and personal property, if any, to which the said Rosa Louisa Davenport now is or she or the said Edward Marshall in her right shall at any time during the said intended marriage become beneficially entitled in possession or reversion (except jewels, trinkets, plate, linen, books, furniture, and other specific articles of a like nature, and except any legacy or other property not exceeding in amount or value 100*l.*) shall be paid, transferred to, or vested in the trustees or trustee upon trust" as therein mentioned.

At the date of the settlement Mrs. Marshall was entitled

under the will of her grandfather, G. F. Furnivall, to a share of his personal estate expectant on the death of her mother.

On November 20, 1875, an order was made in the Probate, Divorce, and Admiralty Division whereby a judicial separation was decreed between Mr. and Mrs. Marshall on the petition of the latter.

On October 13, 1900, Mrs. Davenport, the mother of Mrs. Marshall, died, having devised and bequeathed all the residue of her real and personal property to be converted and divided equally between her son and Mrs. Marshall, the share of the latter to be for her sole and separate use.

The questions now arose whether the share thus bequeathed to Mrs. Marshall by Mr. Furnivall before and that given by her mother after the date of the judicial separation were caught by the covenant to settle after-acquired property, and must be paid to the trustees of the settlement, or ought to be paid over to Mrs. Marshall.

H. Terrell, K.C., and *S. Dickinson*, for the trustees. Both the property acquired by Mrs. Marshall from Mr. Furnivall and that acquired from her mother are caught by the covenant. All property acquired during the marriage is to be settled, and the marriage continues to this day. The judicial separation did not put an end to it, and has no effect upon the operation of this covenant. In *Dawes* v. *Creyke* (1) Bacon V.-C. held that stock to which a married woman became entitled after a judicial separation was not included in a covenant to settle all property acquired "during the coverture." That decision clearly does not apply to Mr. Furnivall's property, which was acquired before the separation: *Waite* v. *Morland*. (2) Sect. 25 of the Matrimonial Causes Act, 1857, provides that whilst the separation shall continue the wife is to be considered as a feme sole with respect to property which she may acquire; but, for the same reason, that does not affect Mr. Furnivall's property, and it passes to the trustees. The property which Mrs. Marshall acquired from her mother is also within the covenant. *Dawes* v. *Creyke* (1) was doubted

(1) (1885) 30 Ch. D. 500. (2) (1888) 38 Ch. D. 135.

BUCKLEY J. 1901 DAVENPORT v. MARSHALL.

in *Waite* v. *Morland* (1); but, even if it is good law, the words of the covenant there were "during the coverture." Marriage is not the same as coverture; and here the coverture has ceased, but the marriage continues and the covenant is still in force. Sect. 25 was never intended to apply to a covenant in a previously executed settlement under which the property passed direct to the trustees and was not really acquired by the married woman at all: she could not have given a receipt for it.

Ingpen, K.C., and *Darley*, for Mrs. Marshall. When Mrs. Marshall became entitled in possession to her interest under Mr. Furnivall's will, it became hers absolutely and was not bound by the covenant: *In re Insole.* (2) It is expressly provided by s. 8 of the Matrimonial Causes Act, 1858, that, where a wife has obtained a separation, property to which she was entitled in reversion at the date of the decree shall be included in the protection given by the decree. The covenant must be construed as if it contained the words "during the said intended coverture," or as if "marriage" meant coverture: *In re Edwards* (3); *Carter* v. *Carter.* (4) The coverture has ceased; therefore Mrs. Marshall ought to be treated as a feme sole, and both funds ought to be paid over to her.

H. Terrell, K.C., referred to *Hill* v. *Cooper.* (5)

BUCKLEY J. referred to the settlement, and held that in the circumstances it was binding on Mrs. Marshall, who was an infant when she executed it, and continued:—Then the next material fact is that on November 20, 1875, the lady obtained against her husband a decree of judicial separation. There had been three children born of the marriage, all of whom are now living. At the date of the settlement, and at the date of the judicial separation, she was entitled in reversion expectant on the death of her mother to a share in the estate of G. F. Furnivall. The settlement contains a covenant that property to which she "now is or shall during the said intended

(1) 38 Ch. D. 135.
(2) (1865) L. R. 1 Eq. 470.
(3) (1873) L. R. 9 Ch. 97.
(4) (1869) L. R. 8 Eq. 551.
(5) [1893] 2 Q. B. 85.

marriage become beneficially entitled in possession or reversion" shall be settled. It appears to me that that reversionary property is plainly within the covenant and is bound by the settlement.

She also became entitled on the death of her mother, who died in 1900, to one-half of her residuary personal estate. She was not entitled to that at the date of the judicial separation, but she became entitled to it afterwards. The question is whether that is property to which she became entitled "during the said intended marriage." In one sense it is. The result of the decree was not to dissolve the marriage; the husband and wife may come together again, and the marriage has not come to an end. But I have to determine what in this settlement is the meaning of the expression "during the said intended marriage." In *In re Edwards* (1) the Court of Appeal had to consider what was the true effect of a covenant to settle after-acquired property without any limit of time. The Court held that, if no contrary intention appeared, it ought to be construed as applying only to property acquired during coverture. James L.J. says (2): "The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore primâ facie is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death. We have consulted the Lord Chancellor on the case, and he agrees with us in the opinion that, in the absence of any expressions shewing that a covenant of this nature was intended to have a more extended operation, it is to be construed, as if the usual words, 'during the said intended coverture,' had been inserted. It appears to his Lordship, as well as to us, that the rule laid down in *Dickinson* v. *Dillwyn* (3) and *Carter* v. *Carter* (4) is to be followed, and not the rule which was acted upon in *Stevens* v. *Van Voorst*." (5) The Court of Appeal, therefore, laid it down that the object of a covenant of this description is to exclude the husband.

(1) L. R. 9 Ch. 97.
(2) Ibid. 100.
(3) (1869) L. R. 8 Eq. 546.
(4) L. R. 8 Eq. 551.
(5) (1853) 17 Beav. 305.

BUCKLEY J.
1901
DAVENPORT v. MARSHALL.

Further, in *Dawes* v. *Creyke* (1) there was a settlement which contained a covenant to settle all property which might be acquired "during the said intended coverture"; and the question was whether a sum of stock to which a married woman became entitled after a decree of judicial separation had been obtained was acquired "during the coverture." Bacon V.-C. held that it was not. The 25th section of the Matrimonial Causes Act of 1857 says this: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her." Bacon V.-C. held that the covenant did not apply because the property was not acquired during coverture. He says this (2): "The effect of the covenant, standing by itself, would be to vest the property in the trustees upon the trusts of the settlement; but it has become wholly inoperative under the separation decree, so long as the decree continues." I think the Vice-Chancellor must have meant that it had become inoperative because the words "during the coverture" were not satisfied as long as the separation continued. These decisions guide me to this—that I ought to test this case on the footing that the intention was to exclude the husband, and, if no question arises of excluding the husband because the Act has already excluded him, the covenant is not intended to apply and is inoperative. The words of this covenant are, "during the said intended marriage." Properly construed, that means during the marriage, in which the usual marital relations subsist, and does not apply to a case where the husband is by reason of a judicial separation deprived of rights in respect of his wife's property. I therefore hold that the property acquired after the separation is not within the covenant.

Solicitors: *Colman & Knight.*

(1) 30 Ch. D. 500. (2) 30 Ch. D. 504.

H. C. R.

BUCKLEY J.
1901
Oct. 31.

In re CLIFFORD. SCOTT *v.* CLIFFORD.

[1901 C. 1183.]

Settled Land—Tenant for Life—Mortgage to discharge Incumbrances—"Required"—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

The word "required" in s. 11 of the Settled Land Act, 1890, is not confined to cases where a mortgagee has given notice to call in his money; the section must be read as if "required" meant "where money is reasonably required having regard to the circumstances of the settled land."

By a family settlement made on August 17, 1888, freehold landed estates in Salop and Staffordshire were settled to secure an annuity of 300*l.* a year to James Robert Scott during the joint lives of himself and his mother Mrs. Scott, and subject thereto to the use of Mrs. Scott during her life, and after her death to the use of J. R. Scott, his heirs and assigns. The settlement contained a proviso that if in any year (after providing for the annuity of 300*l.* and all outgoings) the net income derived from the settled estates by Mrs. Scott should be less than 1000*l.*, the trustees should in every such year, either by sale or mortgage, raise and pay to her the deficiency.

The estates were at the date of the settlement subject to five mortgages for 15,500*l.*, 1000*l.*, 2000*l.*, 3600*l.*, and 800*l.*, charged on different portions of the estate. Since the date of the settlement, 3000*l.* in addition had been raised under powers contained in the settlement, and a sum of 143*l.* was raisable for costs incurred under an order of the Court. All the mortgages bore interest at 4 per cent.

In December, 1899, the mortgagee gave notice to Mrs. Scott calling in the 15,500*l.* mortgage. She endeavoured to procure a transfer of the mortgage, but, owing, as was stated, to a doubt whether the portion of the estates subject to this mortgage constituted a sufficient security, was unable to do so. She therefore arranged to consolidate the mortgages into one

BUCKLEY J.

1901

CLIFFORD, *In re.* SCOTT *v.* CLIFFORD.

mortgage for 26,043*l.* at 3½ per cent., which would reduce by 129*l.* a year the amount of interest payable. On May 15, 1900, she gave notice to the trustees of her intention to do this, and to charge the costs on the estates; on August 23 she gave notices to the other mortgagees of her intention to pay them off; and on March 4, 1901, they were paid off accordingly and the new mortgage executed. The costs of the consolidation amounted to 640*l.*, and it was stated that if the mortgage for 15,500*l.* had alone been transferred the cost would have been 480*l.*

Mrs. Scott took out a summons asking for a declaration that she was entitled to raise by mortgage of the settled land the costs and expenses incurred by her in effecting a discharge of the incumbrances and raising a new loan.

It was alleged that the consolidation would have the effect of keeping free from incumbrances a portion of the estate which it was expected would shortly be developed as a mining property, and which would have had to be included in the security if the mortgage for 15,500*l.* had been transferred separately.

Buckmaster, for Mrs. Scott and one of the trustees. It is right that the estate should bear the costs of this transaction, which is for the benefit of all parties interested, including the remainderman. The reduction of interest increases the income, and makes it less probable that Mrs. Scott will have recourse to the capital; the proposed mining operations will be facilitated, and Mr. J. R. Scott will eventually come into a larger property. The Court can make the order under s. 11 of the Settled Land Act, 1890.

[BUCKLEY J. Can it be said that the whole of this money was "required" to discharge incumbrances? No doubt when the mortgagee called in the 15,500*l.*, that sum was "required"; but the other mortgages were not called in.]

"Required" means whenever the tenant for life in the exercise of his discretion thinks it desirable. The Court will take care that he is not acting improperly. Indeed, the tenant for life is a trustee under s. 53 of the Settled Land Act, 1882. Mrs. Scott might have sold half the property to pay off incum-

brances: s. 21, sub-s. ii., of the Act of 1882. "Required" is not confined to required by the mortgagee: *Hampden* v. *Earl of Buckinghamshire*. (1) A decision to the contrary would affect the validity of the mortgage, which nobody disputes, and it would be necessary on every occasion to induce the mortgagee to call in his money. The money is sufficiently required if it has become due and payable.

Henry Fellows, for the other trustee, referred to *In re Pares' Settled Estate* (2), decided by Kekewich J. in chambers on December 21, 1897.

Dunham, for J. R. Scott. This is an ordinary settlement of real estate with legal limitations, and the Court has no jurisdiction to make this order except under s. 11 of the Settled Land Act, 1890. The remainderman does not contend that "required" in s. 11 is confined to cases where the mortgagee has called in his money; but it does mean that it must be reasonably required. Here the money was only required in order to get a reduction of interest, and that is not enough. It is not for J. R. Scott's benefit. It is very probable that this arrangement will be completely upset before he comes in to the property.

BUCKLEY J. Under the Settled Land Act, 1882, a tenant for life had no power to mortgage the settled land except in the cases mentioned in s. 18, where money was required for enfranchisement or equality of exchange or partition. There was power to sell the land, but not to mortgage it. In 1890 there was passed s. 11 of the Settled Land Act of that year, which for the first time gave power to mortgage for other purposes. The dominant words of that section are: "Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required." The question I have to consider is, What is the meaning of the word "required"? Where the mortgagee gives notice to call in his money the word is clearly satisfied: the money is "required for the purpose of discharging an incumbrance." But is the section

(1) [1893] 2 Ch. 531. (2) Not reported.

BUCKLEY J.
1901
CLIFFORD, *In re.* SCOTT *v.* CLIFFORD.

confined to that? I think that it is not. The section must be read as if it meant "where money is reasonably required having regard to the circumstances of the settled land"; and, in fact, Mr. Dunham, who has argued this case on behalf of the remainderman, did not contend to the contrary.

The facts with which I have to deal here are that there were on the settled estate, of which the applicant is tenant for life, several mortgages, the largest for 15,500*l.* and several others, at the date of the settlement, making up 22,000*l.*, and there were later incumbrances bringing the total to 26,043*l.* That being so, the mortgagee for 15,500*l.* gave notice calling in his money. That money was certainly "required," and the tenant for life would have been entitled to mortgage the settled land in order to raise the costs of obtaining a transfer of that mortgage. When she went into the matter she found that the 15,500*l.* could not be readily transferred, but that, if she were able to consolidate all the mortgages, she could get 26,043*l.* at 3½ per cent. interest instead of 4 per cent. Accordingly, notice to call in having been given to her by the mortgagee of the 15,500*l.* in December, 1899, she gave notice to the other mortgagees of her intention to pay them off, and she effected a mortgage for 26,043*l.* at 3½ per cent. If she had raised the 15,500*l.*, it would have been within her right to charge the costs of doing so on the settled estate, and those costs are said to amount to 480*l.* The costs of the whole transaction amounted to a larger sum, and the difference is said to be 180*l.* or 200*l.* The only question is whether she is entitled to charge that difference on the settled land. If I am right in my view of the section, I have to consider whether the money was "reasonably required" for the benefit of the estate, and whether the tenant for life has acted properly. How does it affect the remainderman? Under the settlement the tenant for life had the income with a right to resort to capital if the income fell below 1000*l.* If she saves ½ per cent. interest on the mortgages, the income will be larger by 129*l.* a year, and the probability of resorting to capital will be less, and that will be a benefit to the remainderman. Again, when he comes into the property he will succeed to a larger income.

Was it reasonable on her part to replace 4 per cent. mortgages by 3½ per cent. mortgages, and were the costs of doing so reasonably incurred? I answer that they were. If I am right in my construction of the section, she was justified in acting as she did, and the costs ought to be raised by mortgage of the estates. I may say that, in arriving at this conclusion, I am fortified by a judgment of Kekewich J. in a case of *In re Pares' Settled Estate* (1), with a copy of which I have been furnished by Mr. H. Fellows. The judgment was delivered in chambers, but it appears to have been a written judgment and initialled by the learned judge. He held that it would be a narrow construction of the section to hold that "required" met only the case of a calling in of a mortgage by the mortgagee, and that it extended to all cases in which the economical administration of the settled estate reasonably demanded that a mortgage should be paid off, whether for the purpose of transfer or otherwise. Mrs. Scott is, therefore, entitled to raise these costs by mortgage of the settled estate.

Solicitors: *Clayton, Sons & Fargus; Taylor, Hoare & Co., for Lee, Russell & Musgrove, Birmingham; Pritchard & Sons.*

(1) Not reported.

H. C. R.

BUCKLEY J.

1901

Nov. 5.

In re JONES.
ELGOOD *v.* KINDERLEY.

[1899 J. 1991.]

ELGOOD *v.* JONES.

[1900 J. 1303.]

Practice—Costs—Administration Action—Real and Personal Estate—Apportionment—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1 *sub-s.* 1, 2 *sub-s.* 3.

The settled practice of the Chancery Division, as stated in *In re Middleton*, (1882) 19 Ch. D. 552, that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate, has not been altered or affected by the Land Transfer Act, 1897.

FURTHER CONSIDERATION.

The only question raised at the hearing of the further consideration of these consolidated actions was whether the Land Transfer Act, 1897, by vesting real estate in the personal representative, had made any difference in the hitherto settled practice of the Chancery Division that the costs of an administration action, so far only as they have been increased by the administration of the real estate, are to be borne by that real estate.

The above-named Louisa Jones, who died in March, 1899, by her will of March, 1887, after appointing an executor who predeceased her, and bequeathing certain specific and pecuniary legacies, devised and bequeathed all the residue of her property, both real and personal, to her brother, who also predeceased her. Letters of administration with the will annexed of the estate and effects of the said Louisa Jones were granted to the plaintiff, one of the next of kin, in May, 1899, the gross value of the real and personal estate at the date of the death being sworn at 43,800*l.*, of which 16,675*l.* was the value of the personal estate, and 27,125*l.* the value of the real estate.

In December, 1899, the plaintiff took out an originating

summons, to which one only of the next of kin was made a defendant, for the administration of the trusts of the will of the testatrix, in which the usual accounts and inquiries necessary for the administration of real and personal estate were directed. Subsequently a second summons was taken out, to which the two co-heiresses of the testatrix, as well as one of the next of kin, were made defendants, which also asked for administration of the real and personal estate; and by an order of November, 1890, the two actions were consolidated.

On June 27, 1901, the master made his certificate as to the result of the accounts and inquiries directed by the administration order in the first action and also certified who were the next of kin and who were the co-heiresses-at-law of the testatrix. The consolidated actions now came on for further consideration.

By the minutes as proposed, the costs of all parties of these actions were to be taxed as between solicitor and client, including in the costs of the plaintiff all costs, charges, and expenses properly incurred by her relating to the administration of the testatrix's estate and the execution of the trusts of the will beyond her costs of the said actions; and then it was suggested that the order should proceed: "and let the taxing master certify what part of such costs, charges, and expenses is properly payable out of personalty and what part out of realty, and for that purpose he is to apportion all general costs, charges, and expenses between personalty and realty in proportion to the respective amounts thereof as valued for probate."

R. J. Parker, for the plaintiff. It has been suggested that since the passing of the Land Transfer Act it is proper to apportion the costs of the action between the real and personal estate, in proportion to the respective values of each estate, and the minutes as drawn provide for this.

C. E. Bovill, for the defendant next of kin. The minutes as proposed are right as far as they go, but a direction should be added that a proportionate part of the costs of obtaining letters of administration should also be borne by the realty. Real

BUCKLEY J.
1901
JONES, *In re.*
ELGOOD *v.* KINDERLEY.
ELGOOD *v.* JONES.

estate now vests in the legal personal representative and has to be dealt with by him; but before he can deal with it he has to take out probate, or letters of administration, as the case may be, to clothe himself with the legal authority necessary to deal with the real estate, and the costs of this ought to fall on the real estate, e.g., 22*l.* out of the 36*l.* ought to be paid by the realty. Even if there were no personal estate, probate would still be necessary as regards real estate. Sub-s. 3 of s. 2 says real estate is now to be administered in the same way as personal estate. True, there is the proviso at the end; but the effect of the earlier part of the section, coupled with the creation of the real representative, has altered the old practice as to costs.

C. T. Mitchell, for one of the co-heiresses. The general costs of an administration action have always been paid by the personal estate, and the costs so far only as increased by the administration of real estate fall on real estate: this rule was established by *Patching* v. *Barnett* (1) and *In re Middleton* (2), and has ever since been recognised as the settled practice of this Court; and it has not been altered by the Land Transfer Act, 1897: the proviso at the end of s. 2, sub-s. 3, expressly preserves the existing rules. The costs of taking out probate ought to follow the same rule as before, and be paid by personalty. [He also referred to *In re Roper* (3) and Seton on Judgments, 5th ed. p. 1267.]

E. Ford, for the other co-heiress, adopted this argument.

R. J. Parker, in reply. I do not dispute the old rule as settled by *Patching* v. *Barnett* (1); I say it is altered since the passing of the Land Transfer Act. This is not a simple action for administration; there are two actions here, and, at any rate since the commencement of the second action, this has only been an action for the administration of the real estate.

BUCKLEY J. In May, 1881, Fry L.J., then Fry J., in *In re Middleton* (2), said that if the matter were res integra he should have been inclined to hold that the costs of administration of real and personal estate ought to be paid rateably; but

(1) (1881) 51 L. J. (Ch.) 74. (2) 19 Ch. D. 552.
(3) (1890) 45 Ch. D. 126, 131.

he considered himself bound by a series of decisions, and thought he was following the usual rule in deciding that the entire costs of the action were primarily payable out of the residuary personal estate. In *Patching* v. *Barnett* (1), which was decided by the Court of Appeal in June, 1881, subsequently that is to the decision by Fry J., the Court of Appeal, overruling that decision, held that, where real and personal estate are being administered in one action, the costs exclusively occasioned by the administration of the real estate must be borne by the real estate, the general costs of suit being borne by the personal estate. In February, 1882, the decision of Fry J. in *In re Middleton* (2) came before the Court of Appeal and was reversed, and the practice as to costs, as laid down by *Patching* v. *Barnett* (1), was followed, Jessel M.R. (3) saying that the case was covered by *Patching* v. *Barnett* (1): "but even if it is not, there is no practice established binding on the Court, such as Fry J. has held to exist"; and then he went on to say that it was only just that the costs of administration, "so far as they have been increased by the administration of real estate should be borne by that real estate"; and the order was varied by a declaration to that effect. This, then, was the established practice as to costs in an administration action of real and personal estate before the Land Transfer Act, 1897, was passed; but it has been contended that the Land Transfer Act, 1897, by vesting the real estate in the personal representative, and by directing the real estate to be administered in the same manner as the personal estate, has made a difference in the former practice, and consequently that all costs must be apportioned between the realty and the personalty in accordance with the respective amount of each estate as valued for probate. Now, the wording of s. 2, sub-s. 3, of the Land Transfer Act, 1897, is as follows: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate: provided

(1) 51 L. J. (Ch.) 74. (2) 19 Ch. D. 552.
(3) 19 Ch. D. 556.

BUCKLEY J.
1901
JONES, *In re.*
ELGOOD *v.* KINDERLEY.
ELGOOD *v.* JONES.

that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies." The present case is one to which this Act applies, and the question I have to decide is, whether after that enactment the former practice as to the costs of an administration action prevails. Suppose a beneficiary were, since the Land Transfer Act, 1897, to bring an action or take out a summons against the legal personal representative for administration of the testator's real and personal estate, upon which the usual order for administration was made, it seems to me the rule, as laid down by the Court of Appeal in *Patching* v. *Barnett* (1) and *In re Middleton* (2), would still remain in force, for, though the earlier part of sub-s. 3 says that the real estate shall be administered in the same manner and subject to the same liabilities for costs and expenses as if it were personal estate, still the proviso at the end goes on to say that "Nothing herein"—that is in the Act—"contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of . . . . testamentary expenses," which include the costs of an administration action.

It is said that the present case is not a case of the kind I have just given, and that there are special circumstances, the special circumstances being that the first action was only brought against one of the next of kin, and subsequently a second action became necessary and was commenced against the co-heiresses and the next of kin, and that the two have been consolidated, and it is suggested that, as from the date of the commencement of the second action, this consolidated action became merely an action for the administration of the real estate. I cannot treat these two actions in that way; they became in fact one action for the administration of the real and personal estate of this testatrix; and if I am right in thinking, as I do, that the Land Transfer Act, 1897, does not make any difference in the hitherto established practice as to

(1) 51 L. J. (Ch.) 74. (2) 19 Ch. D. 552.

costs in an ordinary action for administration of real and personal estate, then the right order as to costs in the present case will be, following the rule laid down by *Patching* v. *Barnett* (1) and *In re Middleton* (2), that the costs of this action, so far only as they have been increased by the administration of the real estate, must be borne by the real estate.

Solicitors: *Arkcoll, Cockell & Chadwick; Blyth, Dutton, Hartley & Blyth; Lawrence, Graham & Co.*

W. C. D.

In re FREAKE'S SETTLEMENT. KINNAIRD *v.* FREAKE.

[1901 F. 790.]

Settled Land—Tenant for Life and Remainderman—Capital Money, Application of—Leasehold Houses—Alterations and Additions with a view to Letting—Electric Lighting Installation—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*ii.*).

Leasehold houses in a fashionable quarter of London were comprised in a settlement. They were more than fifty years old, and were lighted by an imperfect service of gas. In order to satisfy the modern requirements of tenants it was necessary to provide a system of electric lighting for the houses:—

Held, that the provision of an electric lighting installation, exclusive of fittings such as would be ordinarily supplied by a tenant, was an "addition" within the meaning of s. 13, sub-s. (ii.), of the Settled Land Act, 1890, and might properly be paid for out of capital money.

THIS was an originating summons taken out by the trustees of the marriage settlement of Sir Thomas George Freake for leave to apply a certain sum out of capital money in their hands in payment of works specified in a scheme approved by them as being improvements within the meaning of s. 13, sub-s. (ii.), of the Settled Land Act, 1890; or in the alternative that it might be determined whether the cost of such works ought, as between the beneficiaries under the said settlement, to be paid for out of the capital or income of the trust property.

(1) 51 L. J. (Ch.) 74. (2) 19 Ch. D. 552.

JOYCE J.
1901
FREAKE'S SETTLEMENT, *In re.*
KINNAIRD *v.* FREAKE.

The settlement was dated April 20, 1868, and comprised nineteen leasehold houses in South Kensington which were held on long terms, and by it the houses were demised to the trustees for the residue of the terms for which the same were respectively held, except the last days thereof, upon certain trusts for the benefit of the husband and wife and the children of the marriage. The tenant for life, Sir T. G. Freake, had submitted a scheme to the trustees for the execution of certain improvements to three of the leasehold houses held on the trusts of the settlement, and was desirous that a sufficient part of the capital money in the hands of the trustees should be applied in payment of the proposed expenditure. The trustees had approved the scheme subject to the question whether the proposed works were improvements within the meaning of the Settled Land Acts, 1882 to 1890.

The houses in question—6, Cranley Place, 9, Sumner Place, and 36, Onslow Gardens—were all old houses, having been built over fifty years. They were all unlet, and it was found that in order to meet modern requirements it was necessary to provide the houses with (inter alia) an electric lighting installation. The scheme consequently included the proposed expenditure of a certain sum upon wiring the houses for the purpose of electric lighting. The only question upon the summons calling for a report was whether this sum was properly payable out of capital. There was evidence that the houses were only provided with an imperfect gas service which no responsible tenant was likely to accept, and that unless an electric lighting installation were provided there would be difficulty in letting the houses.

Hughes, K.C., and *A. L. Ellis*, for the trustees.

G. R. Northcote, for the tenant for life. The proposed expenditure upon the electric lighting installation clearly comes within s. 13, sub-s. (ii.), of the Act of 1890 as an "addition to" or "alteration in" buildings. There is no authority directly in point, but the cases which have been decided upon the section are tabulated in Wolstenholme on the Settled Land Acts, 8th ed. p. 352.

Bryan Farrer, for the remaindermen. This case is covered by the decision in *In re Gaskell's Settled Estates* (1), which shews that an addition or alteration to a building must, in order to come within s. 13, sub-s. (ii.), be of a structural character. The provision of electric light comes under the same category as electric bells or venetian blinds, which clearly could not be thrown upon capital.

R. Feetham, for Lady Freake, the tenant for life in remainder.

JOYCE J. I understand that a system of lighting of some kind must be provided for the houses. The electric lighting installation will be altogether a new system, and, in my opinion, that is an "addition" which is "reasonably necessary" within the meaning of s. 13, sub-s. (ii.), of the Act of 1890. I shall, therefore, sanction the expenditure, but it will be confined to the wiring of the houses, and will not extend to fittings such as are usually provided by the tenant.

Solicitors: *Pears, Ellis & Co.*

(1) [1894] 1 Ch. 485.

G. A. S.

In re MOSES.
BEDDINGTON *v.* BEDDINGTON.

[1900 M. 1261.]

C. A.
1900
BYRNE J.
Aug. 2, 7.
C. A.
1901
Nov. 7, 9, 11;
Dec. 5.

Power of Appointment—Special Power—Exercise by Will—Settled Land—Lease by Appointor after exercise of Power by Will—Lease in Consideration of Premium—Operation of Appointment on Premium—Ademption—"Capital Money"—Change of Investment—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 23, 24, 27—*Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5—*Settled Land Act*, 1884 (47 *&* 48 *Vict. c.* 18), *s.* 4.

A tenant for life of real estate, who had under the settlement power to appoint the estate by will among his children after his own death, made a will by which he appointed part of the estate to one son and part of it to another son. After the execution of the will the testator, in exercise of the power conferred on him as tenant for life by the Settled Land Act, 1882, granted leases of parts of the appointed property in consideration of premiums paid by the lessees. The premiums were paid to the trustees of the settlement, and were invested by them:—

Held, that, neither by virtue of s. 24 of the Wills Act, 1837, nor by virtue of s. 22, sub-s. 5, of the Settled Land Act, 1882, did the appointment carry the premiums to the appointees.

And, there being, in the opinion of the Court, nothing in the will to shew an intention that the premiums should pass under the appointment:—

Held, that the premiums went as in default of appointment under the provisions of the settlement.

Decision of Byrne J. affirmed.

Though an appointment made by will in exercise of a power takes effect under the instrument creating the power, it has no operation until the death of the testator. There is no relation back to the date of the execution of the will.

The doctrine of ademption applies to an appointment by will, whether made under a general or under a special power.

An appointment by will fails in case of the non-existence at the death of the testator of either the object or the subject of the appointment.

Decision of Farwell J. in *In re Dowsett*, [1901] 1 Ch. 398, approved.

Dicta of Lord Cairns in *Cooper* v. *Martin*, (1867) L. R. 3 Ch. at p. 56, approved.

Dicta of Lord St. Leonards, Sugden on Powers, 8th ed. pp. 308, 309, disapproved.

SUMMONS for the determination of the question, whether an appointment of real estate, made by a testator in exercise of a special power of appointment, comprised, not only the real

estate specifically described in the appointment, but also some premiums paid as the consideration for the granting of leases of parts of the specified estate which were, after the date of the will, granted by the testator under the power of leasing conferred on him as tenant for life by the Settled Land Act, 1882.

Henry Moses by his will dated March 21, 1873, gave and devised to his trustees (inter alia) his freehold estate in the Westminster Bridge Road, consisting of twelve or more houses, his freehold estate in Lime Street, and his freehold estate in the Dover Road, also consisting of houses, among which was a public-house called the Virginia Plant Wine Vaults, upon trust for his son A. H. Beddington for his life, and after his death for all and every the child and children of A. H. Beddington, or for any one or more exclusively of the other or others of them, and for such estates and interests and in such shares and proportions, manner, and form as A. H. Beddington should by his will appoint, and, in default of such appointment and so far as the same should not extend, for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common; if all males or all females, then in equal shares; but if some or two of them should be males and some or one of them should be females, then each male to take double the share of each female. The will also contained a hotchpot clause and a declaration that all females taking benefits under the will should take the same for their separate use.

The will authorized the trustees to grant leases and to take premiums therefor, in some cases for twenty-one years, and in some cases for ninety-nine, but such premiums, if taken, were to be invested and to be treated and considered as part of the corpus or capital of the estate in respect of which the same should have been received, and to go, devolve, and be transmissible accordingly.

Henry Moses died on December 3, 1875.

A. H. Beddington by his will dated July 8, 1892, after a recital of the will of H. Moses and a recital that part of the freehold estate in Lime Street had been taken by the

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON.

Commissioners of Sewers, and was then represented by the sum of 1300*l.* stock of the Madras Railway Company, and that the testator had two sons then living, continued: "Now, in exercise of the power so as hereinbefore appearing vested in me by virtue of the will of my late father, and of every other power in anywise enabling me in this behalf, I hereby direct, limit, and appoint that after my decease all and singular the said freehold estate in the Westminster Bridge Road, wherein I have such life interest as aforesaid, together with the said sum of 1300*l.* stock of the Madras Railway Company, or any hereditaments or property representing the same, shall be and be held in trust for my said son Herbert and his assigns for his life, and that after the decease of my said son Herbert the said freehold estate in the Westminster Bridge Road and the said Madras Railway Stock, or the hereditaments or property representing the same, shall go and be held upon such trusts and for such estates or interests and for such intents and purposes and in such manner and form in all respects as my said son Herbert shall by his will direct or appoint." And the testator made a similar appointment of the Dover Road estate in trust for his son Claude and his assigns for his life, and after his decease upon such trusts, &c., as his son Claude should by his will direct or appoint.

The testator A. H. Beddington died on June 23, 1900.

In 1895 A. H. Beddington, in exercise of his power as tenant for life under the Settled Land Act, 1882, granted leases of two of the houses in Westminster Bridge Road. Each lease was granted in consideration of a premium of 750*l.* The premiums were paid to the trustees of the will of Henry Moses, and were invested by them, partly in freehold land and partly in Metropolitan Consolidated 3 per cent. Stock.

In the year 1898 A. H. Beddington, in consideration of a premium of 14,400*l.*, granted a lease of the Virginia Plant public-house for sixty years. The premium was paid to the trustees of the will of Henry Moses, and was invested by them in the purchase of India Stock. In 1899 part of the India Stock was sold, and the proceeds were invested in the purchase of a house in Westbourne Terrace North.

A. H. Beddington had five children, all of whom survived him and attained the age of twenty-one years—namely, the two sons, Herbert and Claude, and three daughters.

The summons was issued by the trustees of the will of Henry Moses, and was heard before Byrne J. on August 2, 1900.

Alexander, Q.C., and *G. S. Alexander*, for the trustees of the will of Henry Moses.

Swinfen Eady, Q.C., and *Fawcus*, for the sons of A. H. Beddington.

Levett, Q.C., and *Wace*, for the daughters.

H. J. H. Mackay, for the trustees of the marriage settlements of two of the daughters.

Cur. adv. vult.

1900. Aug. 7. BYRNE J., after stating the facts, and referring to and commenting on *Gale* v. *Gale* (1), *Collinson* v. *Collinson* (2), *In re Johnstone's Settlement* (3), and *Blake* v. *Blake* (4), continued:—I think I have referred to all the cases which it is necessary to consider to ascertain what is the true principle to apply in this case. I think *Gale* v. *Gale* (1), notwithstanding the adverse criticisms of Lord St. Leonards and other text-writers, and the observations of Malins V.-C. in *In re Johnstone's Settlement* (5), must, having regard to the decision of Jessel M.R. in *Blake* v. *Blake* (4), be treated as a binding authority in a Court of first instance. Different considerations arise in cases in which the appointment is made by deed and cases in which it is made by will. Different considerations apply when, prior to the date of the will, a change in the nature of the property described in the will has been made, and when the change takes place subsequently to the date of the will, but prior to the death of the testator. I think that, apart from the special provisions of the Settled Land Act, which I shall have to mention again, the question really comes to be one of intention expressed in the will, having regard to the attendant circumstances to which

(1) (1856) 21 Beav. 349.
(2) (1857) 24 Beav. 269.
(3) (1880) 14 Ch. D. 162.
(4) (1880) 15 Ch. D. 481.
(5) 14 Ch. D. 167.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON. Byrne J.

it is legitimate to refer, and it resolves itself into this: Did the testator intend by his will to exercise the power only in the event of the property remaining in the condition he describes, or did he intend to exercise it in reference to the property in whatever condition it should be at the time of his death? This question is one which is easier of determination when the property exists at the date of the will in a condition not corresponding with the description contained in the will than when the words of the will are not apt to fit the description at the date of the death. Now, the premiums received on the granting of the leases are, under the Settled Land Act of 1884, to be deemed capital money arising under the Act, and by s. 22, sub-s. 5, of the Act of 1882 it is provided that "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner, and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." And s. 24 provides (1.) that "Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section"; and (2.) that "Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging." It was argued that under sub-s. 5 of s. 22 such portion of the premiums as was represented by securities upon which it has been invested ought to go to the persons to whom it would go under the power of appointment created before the date of the will and before those moneys arose, notwithstanding the fact that the change in the nature of the property and the investment on those securities took place at a later date. In my opinion the true meaning of s. 22, sub-s. 5, is this, that the

capital money is to be held on the trusts of the settlement—that is, to be held in exactly the same way under the subsisting settlement at the time of the sale as the land so sold would have been held if no sale had taken place. In other words, as soon as this property was sold the capital money was held on the trusts (the only effective trusts then subsisting) of the will of Henry Moses. If that be the true view, it throws one back again on what is the intention of the testator as expressed by his will, having regard, of course, to s. 24 of the Wills Act. It is to be observed that in the present case there had not been a total change of the whole of the property and a reinvestment in some other way. Here there is existing property exactly answering the precise description which the testator used in his will when exercising the power of appointment, and when I am considering what was the true intention it appears to me that the intention of the testator when he made his will was to pass the whole of the property which was subject to the power of appointment in its then state; and although, by reason of his own subsequent act, the property has become less valuable by reason of the taking of premiums on the granting of leases, property sufficient to answer the description which he gave still remains. I have, therefore, come to the conclusion, not without a good deal of hesitation, having regard to the state of the authorities, that no sufficient evidence is to be found in the testator's will, having regard to the circumstances, of an intention to pass what has arisen from the property by way of premiums, or to pass the property in whatever condition it should be found at the date of his death. In my opinion, therefore, the appointment has not operated as regards the land acquired as a reinvestment, or the securities which are subject to be invested in land. The result is that the premiums and the securities now representing them will, under the settlement which still subsists, pass as in default of appointment to the children of A. H. Beddington in the shares mentioned in the will of H. Moses.

G. M.

C. A.

The sons of A. H. Beddington appealed. The appeal came on for hearing on November 7, 1901.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON.

Warrington, K.C., Norton, K.C., and *Fawcus*, for the appellants. The question is in effect, whether an appointment of real estate by the will of the donee of a special power of appointment will carry to the appointee the proceeds of the sale of a part of the appointed estate made after the execution of the will. The question depends partly on the construction of the Wills Act, 1837 (1), and partly on the construction of the Settled Land Acts, 1882 and 1884. (2)

In this case the "settlement" consists of the will of Henry Moses and the will of A. H. Beddington taken together.

(1) By the Wills Act, s. 23, "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

By s. 24, "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

By s. 27, "A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

(2) By the Settled Land Act, 1882, s. 22, sub-s. 5, "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement."

By the Settled Land Act, 1884, s. 4, "A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act."

The son's will should be read into the father's will, and then by the operation of s. 22, sub-s. 5, of the Settled Land Act, 1882, the father's will passes the capital money which represents the land. On the construction of the son's will it is submitted that he intended to appoint that in which under his father's will he had a life interest and a power to appoint among his children. This would include the premiums in question. The doctrine of ademption applies to a testator's own property; it has no application to property over which he has a special power of appointment. The effect of an exercise of a special power of appointment is in substance merely to insert in the will which created the power the name of the particular person who is to take the subject-matter of the power.

The judgment of Byrne J. was really founded on *Gale* v. *Gale* (1); but that decision has been questioned. Sect. 24 of the Wills Act does not apply to a will made in exercise of a special power of appointment. In such a case the operative instrument is that which creates the power, not that which exercises it. Sect. 27 does not of itself apply to a special power; there must be in the will some reference to the power. There are several sections in the Wills Act which do not apply to special powers. In *In re Wells' Trusts* (2) it became unnecessary to decide whether s. 24 applies to a will made in exercise of a special power; but it is plain from what Stirling J. said (3) that in his opinion s. 24 did not apply to such a will; and in *In re Hayes* (4) this Court held that a will did not exercise a special power of appointment which was created after the date of the will. The ground of the decision was that the language of the will did not shew an intention to exercise a non-existent special power, but the Court expressed an opinion that ss. 24 and 27 of the Wills Act did not apply. In *Doyle* v. *Coyle* (5) it was expressly decided that neither s. 24 nor s. 27 of the Wills Act applies to special powers of appointment. In *Cooper* v. *Martin* (6) Lord Cairns L.J. expressed (7) an opinion

(1) 21 Beav. 349.
(2) (1889) 42 Ch. D. 646.
(3) Ibid. 656, 657.
(4) [1901] 2 Ch. 529.
(5) [1895] 1 I. R. 205.
(6) L. R. 3 Ch. 47.
(7) L. R. 3 Ch. 56.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON.

which is in favour of the appellants. Byrne J. did not really deal with this point. He based his decision on cases which apply to general powers.

[COZENS-HARDY L.J. referred to *Airey* v. *Bower*. (1)]

In *In re Dowsett* (2) Farwell J. overlooked the real distinction between a general power and a special power. It is contended that the will must be construed as at its date, and that there is no ademption. The doctrine of ademption has no application to special powers. Indeed, that doctrine would not apply to any power, general or special, but that by s. 27 of the Wills Act it is made applicable to general powers. If an estate is settled to A. for life, remainder to B. for life, remainder to his children as he shall appoint, and B. makes a will exercising the power, after this A., as tenant for life, without the knowledge of B., sells the estate and dies, the result of the decision of Byrne J. would be that the proceeds of sale would not pass under B.'s will. This would be contrary to s. 22, sub-s. 5, of the Settled Land Act, 1882. By virtue of that section the proceeds of sale would pass under B.'s will, and, indeed, they would equally pass if A. had sold the estate before B. made his will. The intention of the son in the present case was to appoint the subject-matter of the power in whatever condition it might be at the time of his death.

Levett, K.C., and *Wace*, for the daughters of A. H. Beddington. On the construction of the son's will the decision of Byrne J. was right. The son might, if he had so intended, have appointed the houses or any investments of the trust fund which might be substituted for them. He has not done this, and the appellants wish to insert in the will words to that effect. In the case of the Madras Stock the testator did use words to that effect.

[COZENS-HARDY L.J. Are those words limited to the Madras Stock?]

The true inference is that the testator intended to appoint only the particular houses which he mentions.

[VAUGHAN WILLIAMS L.J. Was it not reasonable that in

(1) (1887) 12 App. Cas. 263, 268. (2) [1901] 1 Ch. 398.

exercising the power the testator should describe the property as in its actual condition at the date of his will? Can you from that draw any such inference?]

There is still existing property which fits the description in the will, and yet it is said that that description includes property purchased since the date of the will.

[ROMER L.J. Suppose the money derived from one part of the property subject to the power had been employed in improving another part, would the appointee to whom the first part was given be entitled to a charge for the money upon the second part?]

By s. 22, sub-s. 5, of the Settled Land Act, 1882, capital money arising from the sale of settled land is to be held to the uses of the whole settlement; the money is not earmarked to any particular part of those uses.

It is admitted that if an appointment of Blackacre were made by deed the proceeds of the sale of Blackacre would pass; but that is because the deed of appointment becomes at the moment of its execution part of the settlement, even if a power of revocation is reserved. But that would not be so if the appointment were made by will. Suppose the premiums received in respect of the Dover Road estate had been applied in paying off a charge upon the Westminster Bridge Road estate, and after that had been done the son had appointed the Dover Road estate to one of his children and the Westminster Bridge Road estate to another child, could it be said that the latter estate was appointed subject to a charge for the money so applied in favour of the appointee of the Dover Road estate?

[COZENS-HARDY L.J. Would not the appointee of the Dover Road estate be entitled to stand in the shoes of the mortgagee who had been paid off?]

That would depend upon the dates—upon whether the will was executed before or after the charge. The property stood settled as it was settled by the father's will until a will of the son altered the destination, and a will can have no effect during the life of the testator. At the time when these premiums were paid the "settlement" of the property did not include the will of the son, which had not then come into operation because he

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON.

was living. The property was subject to the provisions of the father's will only. A new power arose under that will, and the Westbourne Terrace house was conveyed subject to that power. For the purpose of construction it is immaterial whether the power is general or special. The argument derived from the fact that the testator appointed the whole of the property applies equally to either case. Until the appointment is made there is a vested interest in the persons entitled in remainder. Consequently *Gale* v. *Gale* (1), and other cases in which the power was general, apply to the present case. The real question is, whether there is enough in the son's will to divest the interest of the daughters under the father's will—whether the son has appointed the house and all capital moneys which may arise from it. It is submitted that he has not done this. When the premiums were received they became, under s. 22, sub-s. 5, of the Settled Land Act, a part of the whole settled estate; they were not attached to any particular part of it.

The difference between the effect of an appointment by deed and that of an appointment by will was pointed out in *Cooper* v. *Martin*. (2) A will cannot be looked at for any purpose until it comes into operation by the death of the testator. It is submitted that the decision in *Gale* v. *Gale* (1) was right. It was recognised as a binding authority by Jessel M.R. in *Blake* v. *Blake* (3), and it is referred to in Theobald on Wills, 5th ed. pp. 141, 221, as being good law.

When the subject-matter of an appointment is taken away the appointment does not operate. There is no reason why the doctrine of ademption should not apply to a special power. The decision in *In re Johnstone's Settlement* (4) turned upon the words of the will. The question of construction must always come before that of ademption.

[VAUGHAN WILLIAMS L.J. referred to the observations on *Gale* v. *Gale* (1) in Sugden on Powers, 8th ed. p. 308.]

If a testator by his will gave a house, and then he let the house, taking a premium from the lessee, by virtue of s. 23 of

(1) 21 Beav. 349.
(2) L. R. 3 Ch. 47, 59.
(3) 15 Ch. D. 481, 489.
(4) 14 Ch. D. 162.

the Wills Act the house would pass to the devisee subject to the lease, but the premium would not pass to him.

[COZENS-HARDY L.J. Does s. 23 apply at all to a special power?]

That is a difficult question; but, even if it does apply, still the appointment would not carry the premiums.

It is submitted that the decision in *In re Dowsett* (1) was right. All the authorities were cited there.

The Court is really asked by the appellants to say (1.) that a will made in exercise of a special power must be construed differently from other wills; (2.) that such a will has a retrospective operation which is unknown to the law of wills. The question is really one of intention, and, if so, s. 24 of the Wills Act has no application.

In the case of an absolute owner of property there is no presumption that he intends to dispose of the whole of his property by his will, and this applies equally to a will made in exercise of a special power.

Apparently *In re Dowsett* (1) is the only case in which the doctrine of ademption has been applied to a special power.

Norton, K.C., in reply. In *Blake* v. *Blake* (2) all the sales were made before the will, so that the present point did not arise. In all cases of appointment under a power the presumption (but for the Wills Act) is that the appointor intends to give the property in whatever state it may be at the time of his death.

In *Holyland* v. *Lewin* (3) it was decided that s. 33 of the Wills Act does not apply to an appointment under a special power. And Lord Selborne L.C., in delivering the judgment of the Court of Appeal, said (4): "An appointment under a limited power operates by virtue of the instrument creating the power, the execution when valid being read into, and deriving its force from that instrument"; and he added that, provided that a will executing the power is duly executed according to law, "the execution operates in the same way after the death of the appointor as if the instrument were not

(1) [1901] 1 Ch. 398.
(2) 15 Ch. D. 481.
(3) (1884) 26 Ch. D. 266.
(4) Ibid. 271.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON.

testamentary." Under the old law of wills a devise of real estate was a conveyance operating as from the death of the testator of the real estate which he had at the date of the execution of his will.

The premiums ought to be treated as attached to the particular property in respect of which they were received. The difficulty which arises here would arise equally if the appointment had been made by deed. Under s. 21 of the Settled Land Act, 1882, there is power to apply money arising from the sale of estate X. in improving estate Y. For all practical purposes a will which exercises a special power is equivalent to an appointment by a revocable deed. In order to ascertain the subject-matter of the appointment, you must look at the date of the execution of the will, though not for the purpose of ascertaining the persons who are to take. Sect. 24 of the Wills Act does not apply to the persons who are to take.

In *In re Wells' Trusts* (1) Stirling J. was evidently of opinion that s. 24 does not apply to a will made in exercise of a special power. The doctrine of ademption would no doubt apply to special powers if the subject-matter had gone entirely; it does not apply when there has been merely what may be called a change of investment.

In re Johnstone's Settlement (2) is not distinguishable from the present case. [He also referred to *In re Duke of Marlborough and Governors of Queen Anne's Bounty* (3); *In re Earl of Radnor's Will Trusts* (4); *In re Lowman.* (5)]

Cur. adv. vult.

Dec. 5. VAUGHAN WILLIAMS L.J. read the following judgment:—This case raises a question as to the construction of the will of A. H. Beddington whereby he exercised the power of appointment given to him by the will of his father, Henry Moses. The question is whether the gift of some freehold houses described by name carries some premiums which, after

(1) 42 Ch. D. 646, 656.
(2) 14 Ch. D. 162.
(3) [1897] 1 Ch. 712.
(4) (1890) 45 Ch. D. 402.
(5) [1895] 2 Ch. 348.

the date of the execution of the will exercising the power, were taken on the granting of leases of some of the houses by the testator in the exercise of his power of leasing as tenant for life, under the provisions of the Settled Land Acts, 1882 and 1884. [His Lordship stated the facts in substance as above, and continued:—]

It will be seen, therefore, that a far larger amount was taken from the value of the Dover Street estate, which was appointed to the son Claude, than was taken from the value of the Westminster Bridge estate, given to the son Herbert. This, it is urged, makes it probable that the testator meant to divide the property, the subject of the power, equally between his sons, and makes it improbable that he should have intended to make unequal abstractions from the shares. I do not suppose that, if the houses which have been let on long leases in consideration of heavy premiums had been the property of the testator, and had been so let after the date of a will of the testator leaving the houses to his son, it would be contended that the premiums so taken would pass to the son. But it is contended that the premiums do pass to the son under an exercise of a power of appointment, or at all events of this power of appointment, and the grounds upon which this contention is based seem to me to be, first, that s. 24 of the Wills Act has no application to special powers, but only to general powers. Secondly, that neither *Blake* v. *Blake* (1) nor any of the other cases which decide that a gift of land under a power of appointment exercised by will does not carry the proceeds of the land, have any application to the exercise of a special power, because they are all cases of an exercise of a general power. Thirdly, it is contended that the premiums do pass by virtue of the Settled Land Acts, 1882 and 1884. Fourthly, it is contended that the dicta of Lord St. Leonards in Sugden on Powers, 8th ed. p. 308, and of Lord Cairns in *Cooper* v. *Martin* (2), shew that an alteration in the character of the settled property after the date of a will exercising the power will not prevent the settled property in its altered character from passing. Lastly, it is contended that, if the will of Henry Moses, settling

(1) 15 Ch. D. 481. (2) L. R. 3 Ch. 47.

C. A. 1901

MOSES, *In re.*

BEDDINGTON *v.* BEDDINGTON.

Vaughan Williams L.J.

the property and creating the special power, and the will of A. H. Beddington exercising the power are read together, the premiums taken on granting the leases pass to the appointee. I propose to deal with these contentions seriatim.

First, I will assume that the contention is correct, that s. 24 of the Wills Act has no application to appointments under a special power of appointment. What then? It seems to me to follow that the exercise of the power by the will can only apply to the property as it existed at the time of making the will. I cannot think that the appointment takes effect upon the death of the testator as from the date of the will. The appointment seems to me to be absolutely inoperative until the death of the testator. Nothing vests in the appointee at the date of the execution of the will. It differs in this respect from an appointment by deed under a power giving a power of revocation. It is true that estates created by the exercise of a power take effect precisely in the same manner as if created by the deed which raised the power. But, although what is taken by the appointee, whether realty or personalty, is taken under the authority of the power, yet it is not taken from the time of the creation of the power. There is no relation back, "so as to make things vest from the time of the power, but according to the time of that act executing that power; not like the referring back in case of assignment in commission of bankruptcy; that is, by force of the statute, and to avoid mesne wrongful acts": see per Lord Hardwicke in *Duke of Marlborough* v. *Lord Godolphin* (1); Sugden on Powers, 4th ed. p. 335. Now, in the case of an exercise of a power by will, it seems to me that there is no act exercising the power so long as the will is ambulatory—that is, till the death of the testator. As is pointed out by Farwell J. in his judgment in *In re Dowsett* (2), the same principle which makes a gift to an appointee, under a special power of appointment by will, fail or lapse by reason of the death of the appointee before the death of the testator, also applies to the failure of the subject-matter of the appointment. There is no difference in principle, says Farwell J. (3), between the failure of the object and the

(1) (1750) 2 Ves. Sen. 61, 79. (2) [1901] 1 Ch. 398.
(3) [1901] 1 Ch. 402.

failure of the subject of the power. When a power is exercised by will, although the legatee will take under the authority of the power, yet he does not take under the power solely and exclusively, but under it and the will jointly. The will so made is to be construed and considered like all other wills: *Oke* v. *Heath* (1); Williams on Executors, 9th ed. p. 1079. It is therefore ambulatory, revocable, and incomplete till the death of the testator; consequently no person can take under it who does not survive him: see Williams on Executors. If authority were wanted to shew that the making of a will cannot be treated as an act exercising a power so as to make the exercise take effect from the date of making the will, *Cooper* v. *Martin* (2) is a sufficient authority, because in that case the exercise of the power would have been within the time limited for its exercise, if the date of making the will could have been treated as the date of the exercise of the power.

Secondly, I think that *Blake* v. *Blake* (3) and the other cases decided on the construction of wills purporting to exercise a general power, and the effect of an alteration of the character of the settled property after the making of the will, apply just as much to the exercise of a special power as to that of a general power. In fact, the whole contention that such cases do not apply to appointments in exercise of a special power was based upon the assumption of the relation back of an appointment by will to the date of the will, and falls if that assumption cannot be maintained.

Then, as to the Settled Land Act, 1882. [His Lordship read s. 22, sub-s. 5, and continued:—] I think that the "settlement" in this case is the will of Henry Moses. I do not think that the will of A. H. Beddington, the donee of the power, was part of the settlement at the date of the receipt of the premiums. I think that the only effect of s. 22, sub-s. 5, upon the premiums was, to make them, as "capital money," subject to the power of appointment, and the other provisions in the will of Henry Moses, but that this leaves unaffected the question whether the appointment by A. H. Beddington of the

(1) (1748) 1 Ves. Sen. 135–40. (2) L. R. 3 Ch. 47.
(3) 15 Ch. D. 481.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON. Vaughan Williams L.J.

freehold estates carries premiums taken by him between the date of his will and his death, although those premiums undoubtedly were, by virtue of s. 4 of the Act of 1884, "capital money" within the meaning of sub-s. 5 of s. 22.

Then come the dicta of Lord Cairns and Lord St. Leonards. I will deal first with the dictum of Lord Cairns in *Cooper* v. *Martin*. (1) He said: "I should have had no doubt, speaking with great respect of the contrary view which the Vice-Chancellor appears to have entertained, that the appointment of Pain's Hill, eo nomine, in the will would have been a revocation pro tanto of the appointment in the deed of the 5th of April previous, and would have carried the proceeds of the sale of Pain's Hill if, under the trust for pre-emption by the younger brothers or otherwise, it should become necessary to sell it." It will be seen, however, that there the power of appointment was a power to appoint a fund amongst certain of her children in such shares as the donee of the power should by deed or will appoint, of which fund the proceeds of the sale of Pain's Hill formed a part. Then, by will, the donee of the power, the testator's widow, appointed the Pain's Hill estate by name to her eldest son. It seems plain from this that Lord Cairns did not mean by the passage I have quoted to say that, under a power to appoint real estate, an appointment of a specified real estate would carry the proceeds of that estate, if the estate should happen to be sold between the date of the will of the donee of the power and his death. I do not, therefore, think that the dictum of Lord Cairns assists us in the decision of the present case.

Then, as to the passage from Sugden on Powers, 8th ed. p. 308. He begins by criticising *Gale* v. *Gale* (2) on the ground that it is based on too narrow a construction of s. 27 of the Wills Act. If he meant that an appointment of a specified real estate would in all cases carry the proceeds of its sale, even though invested in the purchase of some other estate, *Moor* v. *Raisbeck* (3) would seem to be a clear authority to the contrary, and it is quoted in Shelford's Real Property Statutes, 8th ed.

(1) L. R. 3 Ch. 56. (2) 21 Beav. 349.
(3) (1841) 12 Sim. 123.

p. 520, as the authority for the passage which Jessel M.R. cited with approval in *Blake* v. *Blake*. (1) Then follows a passage in which Lord St. Leonards certainly does seem to say as a matter of construction that when property, the subject of a power of appointment, is vested in trustees who have a power of sale, with the consent of the donee of the power of appointment, which power they exercise after the date of the will exercising the power of appointment, the appointment would not be defeated by the change in the character of the estate. Lord St. Leonards says that, supposing a personal fund to be settled on a marriage, in like manner as the real estate was settled in *Gale* v. *Gale* (2), and there was a power in the settlement to vary the securities, it could hardly be held that an appointment by will of the fund in its then present state would be defeated by a variation in the investment of it, under the power for that purpose, subsequently to the will. Jessel M.R. in *Blake* v. *Blake* (1) did not agree with this view. He thought that the sale, being made with the consent of the donee of the power, had the same effect as a sale of the donee's own land would have had, and he declined to read the gift of the land as a gift of the proceeds. It is true that, in both *Gale* v. *Gale* (2) and *Blake* v. *Blake* (1), the power of appointment was general, and the sale was with the consent of the donee of the power, and these facts certainly made the case very like the case of a devise of the land of the testator, and a subsequent sale of the same land by the testator. But, even if one regards the exercise of a special power as being merely the nomination of a member or members of a class to take specific property included in the power of appointment, yet, if the property as described ceases to exist, it would seem that the appointment must fail, unless you can find in the terms of the will, construed in the light of the instrument creating the power, something to shew that the donee of the power intended to appoint that portion of the settled property in whatever state it might be found at the time of his death. In the hypothetical case put by Lord St. Leonards he found evidence of the intention in the fact that the trustees of the settled property were assumed to have power to vary the

(1) 15 Ch. D. 487. (2) 21 Beav. 349.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON. Vaughan Williams L.J.

investments, and in *In re Johnstone's Settlement* (1) Malins V.-C. drew the same inference from a similar power. On the whole, I think that, even if it is assumed that such a rule of construction is right in cases in which the property the subject of the appointment is vested in trustees, who have a power of changing the investment of the property, and who in fact do change the investment after the date of the will of the donee of the power, the rule does not apply in a case in which the change of investment results from a sale by the donee of the power after the date of his will.

As, in my opinion, all the above-mentioned contentions in favour of the view that the present appointment carries the premiums taken on the granting of the leases fail, the only point left is one of construction. And I regret that I cannot persuade myself that, on the true construction of the will of A. H. Beddington, the appointment of the freehold houses by name extends to carry the premiums taken by him when exercising his power of leasing as tenant for life under the Settled Land Act. I regret it, because I fear this construction may defeat the intention of the testator. I can only say that for the future a donee who wishes an appointment to carry the property the subject of the power, however it may happen to be invested at the time of his death, will know that he must say so in express terms in his will. I do not say that *In re Johnstone's Settlement* (1) is bad law. It is not necessary to do so. That case does not really touch the present case. That was a case of mere construction in which the surrounding circumstances were different from those of the present case. But I do hold that a will made in the exercise of a power is to be construed and considered in the same way as all other wills, and that the Court cannot have recourse to speculation to construe it.

ROMER L.J. read the following judgment:—I have had an opportunity of reading the judgments of my brothers, and, as they express also my views on the chief points arising, I desire only to add a few words to what they have written. In the first place, I may point out that,

(1) 14 Ch. D. 162.

when A. H. Beddington in his will refers to and appoints by name the different estates over which he had the special power of appointment (e.g., the freehold estate in the Westminster Bridge Road), although he uses short expressions, his will is in effect the same as if, instead of using the short expressions, he had given the full particulars of those estates. For example, his appointment of the freehold estate in the Westminster Bridge Road is an appointment of the houses constituting that estate at the date of the will, as if he had specifically mentioned each house. So that the legal question arising in this case may be shortly stated as follows. A person having a special power of appointment by will over a settled estate consisting of lands and houses, appoints by will a particular house to A. (an object of the power), and either appoints the rest of the estate to other objects of the power, or lets it go as in default of appointment. There is nothing in the will beyond what I have stated to cast a light upon the testator's intentions. After the date of the will the testator, as tenant for life of the settled estate under the settlement, sells, under the Settled Land Acts, the house appointed to A. The question is, whether the proceeds of sale pass to A. under the appointment. Now, I agree with my brothers that the provisions of the Settled Land Acts do not shew that that question must be answered in the affirmative. Those provisions do shew that the proceeds of sale were subject to the special power to appoint by will, but still leave it to the will to appoint, or not to appoint, those proceeds, as the testator might think fit. Nor, even assuming that s. 23 of the Wills Act applies to special powers, is there, in my judgment, anything in that section which makes the proceeds pass to A. I cannot see how the proceeds can be said to constitute an "estate or interest" in the house sold, within the meaning of those words as used in the section. And I may point out that after the sale of the house the proceeds of sale became "capital moneys" in respect of the settled estate generally, and had no special relation, during the testator's life and before his will came into operation, to any particular part of that estate. It seems to me, then, that the question narrows itself to this:

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON. Romer L.J.

Can it be gathered from the will, regard being had to the instrument creating the power, that the testator intended the proceeds of sale to pass to A.? I cannot say that it does so here. The testator may or may not have so intended, and different persons may hold different views as to the probabilities one way or the other. For myself, I decline to speculate as to his intentions. He has not said in his will that the proceeds are to pass, nor can I be sure from the will that he even wished the proceeds to pass. For all I know, he might have had special motives in appointing the house itself to A., which would not induce him, or make him wish, if the house were sold, to appoint the proceeds to A.

I will only add a few words about the cases which have been cited.

The reasoning of Jessel M.R. in *Blake* v. *Blake* (1), where he deals with *Gale* v. *Gale* (2), though those were cases of a general power, appears to me to apply to the present case. And, with reference to the criticism of Lord St. Leonards on *Gale* v. *Gale* (2), I may observe that he himself relies on the intention of the testator. He says (Sugden on Powers, 8th ed. p. 308) that "The testator did not intend his legatees to take the settled estate itself, but the produce of it, and that was precisely the condition in which the settled property stood at his death." But that was begging the whole question. If the intention of the testator was to appoint the proceeds of the sale of the estate, I know of no reason why effect should not be given to that intention. But, of course, that intention must appear from the will itself, regard being had to the instrument creating the power. So that again one is brought back to the point, whether from the will you can gather that the testator has appointed the proceeds. No doubt, in many cases, though an appointment may be of a property by a particular description, there may be sufficient in the will to shew that the testator meant to appoint, and has really appointed, whatever might represent that property at the time of his death. It is, in my opinion, only on this ground, if at all, that the decision of Malins V.-C. in *In re Johnstone's*

(1) 15 Ch. D. 481. (2) 21 Beav. 349.

Settlement (1) can be supported. And this was, I think, the ground on which *Willett* v. *Finlay* (2) was decided. In that case the power was to appoint by will a settled fund of 1000*l.*, which was at the date of the will invested on loan to a Mr. Fitzpatrick on mortgage. The will, which was of an informal character, appointed the 1000*l.* by the description of: "the 1000*l.* Mr. Fitzpatrick has," and I gather that the Court in effect held that the intention sufficiently appeared to appoint the 1000*l.* as a fund, and that the reference to Mr. Fitzpatrick was descriptive only of the then condition of the fund, and that it was not in essence merely an appointment of a debt which primâ facie would be adeemed by being paid off. With regard to the observation of Lord Cairns in *Cooper* v. *Martin* (3), which is, of course, of great weight, I think it is fully explained by the fact that in that case the power was in terms to appoint the proceeds of sale of an estate devised in trust for sale, and an appointment of the estate under such a power could only operate on the estate through the proceeds.

Lastly, I may say that I agree with the excellent judgment of Farwell J. in *In re Dowsett.* (4)

Of course, I need scarcely point out that the present case is not one in which the estate appointed has been wrongfully sold or dealt with between the date of the will and the death. In such a case there would be no ademption. The present is a case in which not only was the sale not wrongful, but it was effected by the action of the testator himself.

For these reasons, I think that the decision of Byrne J. was correct, and that the appeal should be dismissed.

COZENS-HARDY L.J. read a judgment, in which, after stating the facts, he continued:—Now the matter may be considered, first, having regard to the express provisions of the Settled Land Act, and, secondly, under the general law applicable to powers. [His Lordship read s. 22, sub-s. 5, of the Settled Land Act, 1882, and continued:—]

It is argued on the part of the sons that the language of the

(1) 14 Ch. D. 162.
(2) (1891–2) 29 L. R. Ir. 156, 497.
(3) L. R. 3 Ch. 47, 56.
(4) [1901] 1 Ch. 398.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON. Cozens-Hardy L.J.

statute is clear and expressly applicable to the case; that, if the specific properties had not been dealt with under the Settled Land Act, it is plain that the sons would have taken them under the combined effect of the grandfather's will and the father's appointment, and that the securities on which the capital money is invested are by the Act directed to go to the same persons as the land would have gone if not disposed of. In my opinion, this contention cannot prevail. The will of the father, so long as he lived, was no part of "the settlement" within the definition contained in s. 2, sub-s. 1, of the Act. The proceeds of the sale of a house, or the premium on a lease of a house, named in the appointment to the son Herbert, might properly have been applied in payment off of an incumbrance on a house named in the appointment to the son Claude. There was in truth, until the father's death, only one settlement, namely, the grandfather's will. This capital money was, by virtue of s. 22, held upon trust for the son for life, with a special power of appointment by will in favour of his children, and subject thereto upon trust for all his children as real estate. Sect. 22 does not in any way enlarge or alter the effect of the testamentary appointment by the will of 1892.

The question under the general law, apart from the Settled Land Act, may be stated as follows. When an appointor, who is not disposing of his own property, but is merely designating the persons who are to take property under an instrument which contemplates and authorizes a change of investment, appoints a particular portion of the property to an object of the power, is that appointment defeated by reason of a change of investment? Now, on principle and apart from authority, it seems to me that everything must depend upon the true construction of the testamentary instrument which is said to have exercised the power. It manifestly differs from an appointment by deed, with a power of revocation. The appointee under a will must survive the appointor, whereas an appointment by deed will not fail by reason of the death of the appointee in the lifetime of the appointor. If the doctrine of lapse applies to an appointment under a special power, it seems

to follow that the doctrine of ademption must likewise apply. It is said that you must read the instrument exercising a special power into the instrument creating the power. But a will is "ambulatory" and incomplete in its operation during the life of the testator. It is a disposition, or, in the case of a power, a designation, of certain property in favour of a certain individual, dependent upon the existence of both the property and the person at the moment of the death of the testator. The rules for construing a will exercising a power are, except so far as they are altered by the Wills Act, the same as those for construing a will disposing of a testator's own property. In each case it is a question of intention, to be gathered from the words used, and not from speculation as to what the testator would probably have desired. If the language used is such that a devise of his own property would have failed by reason of some subsequent act, an appointment under a special power in the same language must equally fail. The subsequent act need not be the act of the testator himself. For example, a devise of Blackacre, which is subject to a mortgage, will be defeated if the mortgagee sells under his power of sale in the testator's lifetime, and the devisee will not take the surplus proceeds in the hands of the mortgagee. A will may, however, be so framed as to indicate an intention to give or appoint property, however invested, or notwithstanding any change of investment. An illustration of this is furnished by the decision of Malins V.-C. in *In re Johnstone's Settlement.* (1)

There is not much authority on the point. I put aside cases, such as *Gale* v. *Gale* (2) and *Blake* v. *Blake* (3), in which a testator has exercised a general power. They may be considered as equivalent to dispositions of a man's own property, and therefore distinguishable. But Lord St. Leonards, in the 8th edition of his work on Powers, p. 309, undoubtedly expressed a strong view that, in the common case of a marriage settlement, with a power to the father to appoint the fund by will among the children of the marriage, "it could hardly be held that an appointment by will, of the fund in its then present state, would be defeated by a variation in the investment of it, under the power for that purpose, subsequently to the will." No authority

(1) 14 Ch. D. 162. (2) 21 Beav. 349. (3) 15 Ch. D. 481.

C. A. 1901 MOSES, *In re.* BEDDINGTON *v.* BEDDINGTON. Cozens-Hardy L.J.

is quoted by Lord St. Leonards in support of this view. Lord Cairns has been sometimes treated as having expressed in *Cooper* v. *Martin* (1) the same view, although it was not necessary for the purposes of his decision. But it seems to me that there is no foundation for this. The Pain's Hill estate was devised to trustees in terms which rendered a sale necessary, and the widow had a testamentary power of appointment over the proceeds of sale in favour of her children or issue. Lord Cairns only said that an appointment of Pain's Hill eo nomine would have carried the proceeds of the sale of that estate. The only power the widow had was over the proceeds of sale, and her will sufficiently indicated an intention to exercise that power. No general principle was laid down by Lord Cairns. So far as I am aware, the precise question has never arisen for decision until *In re Dowsett* (2), in which Farwell J. decided that, for the purposes of ademption, there was no difference between a special and a general power, and that the doctrine applies to both alike. I agree with that view of Farwell J., which seems to me to be consistent with general principles.

It remains to consider the terms of the particular instruments in this case, namely, the will of the grandfather and the will of the father. I observe that the leases which give rise to the question before us were granted, not under any power in the grandfather's will, but under the Settled Land Act. They were due to the father himself in his capacity as tenant for life. There is nothing in his will which in any way points at the investments of capital money in the hands of the trustees. I decline to speculate as to what he would have desired, if his attention had been drawn to the fact that his will had not dealt with these capital moneys. It is sufficient for me that he has not done that which is necessary to defeat the title of the children who take in default of appointment.

I think the judgment of Byrne J. was correct, and that the appeal should be dismissed.

Solicitors: *Montagu, Mileham & Montagu; Upton, Atkey & Co.*

(1) L. R. 3 Ch. 56.

(2) [1901] 1 Ch. 398.

W. L. C.

In re FAULDER & CO.'S TRADE-MARK.

C. A. 1901 Nov. 30.

Trade-mark—Registration—"Distinctive Word"—"Addition" to Trade-mark—Addition registered as Part of Trade-mark—"Disentitled to Protection"—Disclaimer—Disclaimer subsequent to Application for Registration—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 73, 74.

In 1887 the F. Company registered, in connection with jams, a trade-mark consisting of the word "Silverpan" in large type with their signature underneath, and subsequently the word by itself became identified in the market with their goods. In 1900 the R. Company, rival jam manufacturers, applied that the entire trade-mark might be removed from the register as "being calculated to deceive or otherwise disentitled to protection," within s. 73 of the Patents, Designs, and Trade Marks Act, 1883, or, in the alternative, that the word "Silverpan" might be disclaimed under s. 74 as being a "distinctive word":—

Held, by the Court of Appeal (reversing Kekewich J.), that the word "Silverpan" was to be regarded as an "addition" to, and not part of, the trade-mark, and that at the date of registration it was a word "distinctive" of the F. Company's goods, that is, "primâ facie distinctive": *Burland* v. *Broxburn Oil Co.*, (1889) 42 Ch. D. 274; and, therefore, ought to have been disclaimed under s. 74; but, the F. Company submitting, an order was made to remove the entire trade-mark from the register.

In re Clément & Cie.'s Trade-mark, [1900] 1 Ch. 114, and *In re Smokeless Powder Co.'s Trade-mark*, [1892] 1 Ch. 590, approved of and distinguished.

Per Romer L.J.: The word "distinctive" in s. 74 means something which, at the time of registration, is chosen by the applicant and is primâ facie suitable, when used, for the purpose of distinguishing his goods from the goods of others.

Whether a disclaimer under s. 74 can be made or ordered subsequently to the application for registration of the trade-mark, *quære*.

On June 3, 1887, Henry Faulder & Co., a firm of jam manufacturers in Stockport, registered a trade-mark in class 42 for preserves. The trade-mark, which was duly advertised in the *Trade Marks Journal*, consisted of the word "Silverpan," printed in large black type with the signature, "Henry Faulder & Co.," underneath, the word "Silverpan" being the most prominent feature of the mark. The firm was subsequently turned into a company called "Henry Faulder & Co., Limited,"

C. A. 1901

FAULDER & Co.'s TRADE-MARK, *In re.*

which thereupon became the registered proprietors of the trade-mark.

On October 31, 1900, a company carrying on business as grocers and jam manufacturers in Wigan called "O. & G. Rushton, Limited," which was being sued in the Palatine Court of Lancaster by the Faulder Company for alleged infringement of the trade-mark and passing off of preserves under labels bearing the word "Silverpan," served the Faulder Company and the comptroller with a notice of motion under s. 90 of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, to have the register of trade-marks rectified (*a*) by the removal of the Faulder Company's trade-mark, or (*b*) alternatively, by adding to the entry therein of that trade-mark a disclaimer of any right on the part of the registered proprietors to the exclusive use of that part of the mark consisting of the word "Silverpan." The applicants, the Rushton Company, insisted on their right to use the word "Silverpan" for their goods, and contended that the trade-mark, so far as it consisted of the word "Silverpan," had been improperly registered; that it was not a "fancy word not in common use," or otherwise capable of registration under s. 64 of the Act; that it was not in any way distinctive of the Faulder Company's goods, but was merely a combination of two English words descriptive of the mode of manufacture of jams and preserves, and was so understood by the public and used by the Faulder Company; and that that company was not entitled to acquire an exclusive right therein by registration. In support of that contention an affidavit was filed on behalf of the Rushton Company, in which it was stated that many manufacturers were in the habit of boiling their jams in silver or silvered pans, and laid great stress on this in their advertisements as a guarantee of the purity of their jams.

In an affidavit filed by the managing director of the Faulder Company in opposition to the motion it was stated that since the original registration of the trade-mark the Faulder firm and the company, their successors, had been in the habit of attaching to their goods labels with the word "Silverpan" printed sometimes as one word, sometimes as "Silver pan,"

and occasionally as "Silver pan," and that by reason of such user the word had become and was exclusively indicative to purchasers of the fact that the goods to which it was applied were goods of that firm or company. The deponent further disputed the accuracy of the applicants' statement that jam manufacturers boiled their jams in silver pans, and was confident that none of them (other than the Rushton Company) described their goods as "Silverpan" goods; and he submitted that the Rushton Company were not entitled to describe their goods as "Silverpan" goods so as to cause deception. He also stated that the word "Silverpan" had become so identified with the Faulder Company's goods that letters frequently reached the company addressed merely to "Silver Pan Preserve Works, Stockport."

Upon the motion being opened before Kekewich J. on December 7, 1900, counsel for the Faulder Company stated that they would not contend that "Silverpan" by itself was a good trade-mark; whereupon counsel for the applicants, the Rushton Company, contended that there ought to be a disclaimer, under s. 74 of the Act, of the use by itself of the word "Silverpan," to which it was replied that "Silverpan" was one of those words which did not require a disclaimer—that it did not come within the disclaiming section, s. 74, sub-s. 2, as a "distinctive word." The motion having then been argued upon that point, Kekewich J. refused it with costs, holding that "Silverpan" was not a "distinctive word" within the meaning of s. 74 of the Patents, Designs, and Trade Marks Act, 1883, so as to require a disclaimer, and was not, under s. 73, "calculated to deceive or otherwise disentitled to protection." (1)

O. & G. Rushton, Limited, appealed.

The appeal was heard on November 30, 1901.

On the appeal being opened it was stated by counsel on behalf of the respondents, the Faulder Company, that they did not rely on the trade-mark as their ground of action in the Palatine Court, and they offered to amend their claim in the

(1) (1900) 18 Rep. Pat. Cas. 37.

C. A. 1901

FAULDER & Co.'s TRADE-MARK, *In re.*

action by striking out all statements supporting the trade-mark as such, relying solely upon the allegations of "passing off" or "make-up."

Moulton, K.C., and *A. J. Walter*, for the appellants. The offer on behalf of the respondents comes too late. They cannot take for their own exclusive use a word of the English language—that is, a word common to all. It is not suggested that we are using the respondents' trade-mark, which consists, not of the word "Silverpan" alone, but of that word coupled with the signature underneath. All that is complained of is that we are using the word "Silverpan." Now, "Silverpan" by itself cannot be claimed as a trade-mark the infringement of which can be restrained. The use of the word "Silverpan" in large letters on the top, with the signature underneath, leads to the idea that "Silverpan" is an essential part of the trade-mark, and that no one else can use it at all, and we are being sued for the use of that word as an infringement. Treating this word, which was not one capable of registration, as being of the substance of the trade-mark, is an abuse of the Act, and the word should, therefore, be either expunged or disclaimed: if it remains, it is calculated to deceive. Under the definition section—s. 64, sub-s. 1 (*b*)—one of the "essential particulars" of a trade-mark is "a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark." Then sub-s. 2 says: "There may be added to any one or more of these particulars any letters words or figures, or combination of letters words or figures, or of any of them." It is apparently under that section that the present trade-mark has been registered, "Silverpan" being, under the sub-section, a word "added" to the "written signature." But s. 73 says that "it shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice," the clause being substantially the same as that in s. 6 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91); and this word "Silverpan" comes within the

section, since it is a word of which the respondents are not entitled to the exclusive use, and which is, therefore, disentitled to protection—that is to say, it is a "distinctive word" within s. 74, sub-s. 1 (*b*), though common to the trade, and is an "addition" to the signature; the signature alone being entitled to protection. Accordingly the respondents must, under sub-s. 2, disclaim any right to the exclusive use of that "addition," and a copy of the disclaimer must be entered on the register. "Distinctive" means "primâ facie distinctive": *Burland* v. *Broxburn Oil Co.* (1), the "Washerine" case. *In re Clément & Cie.'s Trade-mark* (2) shews that an addition to a trade-mark under s. 64, sub-s. 2, requires a disclaimer under s. 74.

[*Warrington, K.C.* I agree that "Silverpan" is an addition to the "essential particulars" of the trade-mark, but not to the trade-mark itself.]

The word is clearly "distinctive," and this is admitted in the respondents' own affidavit. Sect. 74 shews that you can use a word common to the trade as distinctive.

[ROMER L.J. There can be no doubt that a "distinctive word" means a word distinctive of the goods, not a distinctive word of the English language.]

That is so. And here "Silverpan" was taken as a word to distinguish the Faulder Company's goods, as is in fact shewn by its being printed on the labels in large and prominent type.

[*Warrington, K.C.* The word may have become "distinctive" by reason of the user of the trade-mark after registration; but that is not the test. The true test is, was it "distinctive" at the date of registration? I say it was not.]

At all events it was then a word capable of being distinctive, and was selected for that express purpose, and it should, therefore, be disclaimed. If it is not "distinctive," it is "descriptive," and is therefore excluded from registration by the words "or otherwise" in s. 73: *In re Anderson's Trade-mark* (3); *In re Arbenz' Application.* (4)

Warrington, K.C., and *Sebastian*, for the respondents, the Faulder Company. The sole question is whether "Silverpan"

(1) 42 Ch. D. 274.
(2) [1900] 1 Ch. 114.
(3) (1884) 26 Ch. D. 409, 415.
(4) (1887) 35 Ch. D. 248.

C. A. 1901 FAULDER & Co.'s TRADE-MARK, *In re.*

is a "distinctive word" within s. 74. If the Court should hold that it is, and that we must therefore disclaim, we would prefer to have our trade-mark taken off the register altogether. The test is not whether "Silverpan" is a "distinctive word" now, but whether it was so at the date of registration. What is the scheme of ss. 64 and 74? By s. 64 your trade-mark "must" consist of or contain at least one of the "essential particulars" there mentioned, one being "a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark"; and then you "may" add "any letters words or figures." Then s. 74 says that, if you do add to the trade-mark "any distinctive word" that is "common to the trade," you must "disclaim" any right to the exclusive use of that distinctive word; but you need not disclaim a word that is not distinctive: *In re Clément & Cie.'s Trade-mark.* (1) Now, "distinctive" and "common to the trade" are expressions that are mutually destructive, as was pointed out by Chitty J. in *Burland* v. *Broxburn Oil Co.* (2); but he met the difficulty by saying that "distinctive" means "primâ facie distinctive"—that is, a word that would be distinctive of the particular goods if it was not common to the trade; and, construing s. 74 by reading back to s. 64, he held that if an added word was not capable of registration as a "fancy word" under s. 64, but was peculiar to and distinctive of the particular goods and therefore not common—that is to say, not open to the trade—you must disclaim: see also Sebastian on Trade Marks, 4th ed. p. 352. Now, "Silverpan" was not at the date of registration a "primâ facie distinctive" word, and therefore that case does not apply here. We do not, by the user of the word since the date of registration, appropriate it to ourselves, and we cannot do so: other people may use the word, provided only that they add some words to distinguish their goods from ours. The word is in fact not "distinctive": it is, as is agreed on both sides, descriptive of the mode of manufacture; but a word that is merely descriptive is not subject to disclaimer at all. *In re Smokeless Powder Company's Trade-mark* (3) exactly applies. There Chitty J. held that

(1) [1900] 1 Ch. 114. (2) 42 Ch. D. 274, 278. (3) [1892] 1 Ch. 590, 594.

the words "Smokeless Powder" forming part of the trade-mark were not distinctive, but descriptive only, and therefore did not require any disclaimer under s. 74. There is, in short, in the Act no provision for disclaimer in such a case as this, for the word "Silverpan" is not an "addition" to the trade-mark at all: it is itself part of the trade-mark as registered; and s. 74 applies only to a distinctive word that is an "addition to any trade-mark." If, on the other hand, the word is to be treated as an addition, it was not, at the date of registration, even primâ facie distinctive, so neither on this footing was any disclaimer necessary.

VAUGHAN WILLIAMS L.J. In my judgment this appeal ought to be allowed. The real question we have to decide in this case is whether or not the word "Silverpan" is a "distinctive word" within the meaning of s. 74 of the Act of 1883. If it is, the result is that the respondents Henry Faulder & Co., Limited, will have to disclaim under that section.

Now, with regard to the meaning of the word "distinctive" in s. 74, Mr. Warrington does not quarrel with the definition of that word which is given by Chitty J. in *Burland* v. *Broxburn Oil Co.* (1), the "Washerine" case. The definition or meaning of that word which is given by Chitty J. in that case is "primâ facie distinctive." The question we have then to ask ourselves here is, whether this word "Silverpan" is primâ facie distinctive as used in the advertisement in the *Trade Marks Journal.* In my judgment, it is primâ facie distinctive; it is not an English word: it is a word which is formed by putting together two common words. I entirely agree with Mr. Warrington that in considering the question we must have regard to the state of things which existed at the time of the registration; and taking that to be so, it seems to me that the word is primâ facie distinctive.

It is not worth while to go through all the cases, but I will just deal with one or two in which the words used have been held not to require disclaimer under s. 74. One of those cases is *In re Clément & Cie.'s Trade-mark* (2), which went to the

(1) 42 Ch. D. 274. (2) [1900] 1 Ch. 114.

C. A. 1901 FAULDER & Co.'s TRADE-MARK, *In re.* Vaughan Williams L.J.

Court of Appeal. In that case, the words "St. Raphael" were part and parcel of what Romer L.J. in his judgment called the "lower label"; and under those circumstances it was held, and, if I may say so, very naturally held, that the words "St. Raphael" which occurred in the course of the long sentence in the lower label were not distinctive.

In the same way, in *In re Smokeless Powder Company's Trade-mark* (1), before Chitty J., it was held by that learned judge that the words "Smokeless Powder" were not distinctive. What he says is this (2): "Now, in my opinion, the words 'Smokeless Powder' are not distinctive words, or a distinctive combination of words—they are two ordinary English words denoting that no smoke, or practically no smoke, comes from this powder." In addition to that, he calls attention in another part of his judgment to the fact that the words "Smokeless Powder" were really only part and parcel of the registered design, which is shewn on page 591 of the report.

I have only to add one word as to the facts that appear from the affidavits. Although I said, and I still say, that I agree with Mr. Warrington as to the date at which the test is to be applied as to whether a word is a primâ facie distinctive word or not, I am not at all sure that in order to form a judgment on a question such as we have here one is not entitled to take into consideration the fact that since that date the word has been used as a distinctive word, quite irrespective of the circumstance that something may have happened since the date of registration, which did not then exist, to enable the word so to be used as a distinctive word. That, however, is not a matter of any great importance, because, in my judgment, the word "Silverpan," as used in the registered advertisement, was clearly intended to be used as a distinctive word; and under those circumstances I think it is necessary that there should be a disclaimer under the provisions of s. 74.

ROMER L.J. I agree. As was pointed out by Lord Lindley, when Master of the Rolls, in the case of *In re Clément & Cie.'s Trade-mark* (3), there might be cases in which it would be

(1) [1892] 1 Ch. 590. (2) [1892] 1 Ch. 594. (3) [1900] 1 Ch. 121.

extremely difficult to say, with reference to s. 64 of the Act of 1883, whether particular words were part of the trade-mark or were an addition to it. He said in that case that he thought the words there in question were obviously part of the trade-mark. I can only say that in this case I think the word objected to, "Silverpan," is clearly an addition to the trade-mark and not a part of it. Then, if that be so, the question arises whether that addition is distinctive or not within the meaning of the word "distinctive" as used in s. 74, for if it is, then it must be disclaimed. That gives rise to the consideration of what is "distinctive" within the meaning of the word as used in s. 74 of the Act. I may point out that an "addition" would not necessarily be non-distinctive merely because it could not be in itself a good subject of a trade-mark. That was pointed out in the "*Washerine*" *Case* (1), which, in my opinion, was rightly decided by Chitty J., and really governs this case. Looking at the Act of Parliament, and trying to gather from its language what the intention of the Legislature was, I think that the word "distinctive," as used in s. 74, was employed to mean something, at the time of registration apparently, chosen by the applicant who is seeking to register his trade-mark, and primâ facie suitable, when used, for the purpose of distinguishing his goods from the goods of others. Applying that test to the present case, it is clear to me that the word "Silverpan" is "distinctive"; and, that being so, it follows that there must either be a disclaimer of the word, or the trade-mark must be taken off. I understand, from what Mr. Warrington said, his clients prefer that the trade-mark should be taken off.

I would only add that, in my opinion, this case is quite distinguishable from *In re Smokeless Powder Company's Trade-mark* (2), as has been pointed out by my Lord, and that there is nothing in the case of *Clément & Cie.'s Trade-mark* (3), or what was said there by the judges of the Court of Appeal who decided that case, which in any way militates against this judgment.

(1) 42 Ch. D. 274. (2) [1892] 1 Ch. 590.
(3) [1900] 1 Ch. 114.

C. A. 1901 FAULDER & Co.'s TRADE-MARK, *In re*.

COZENS-HARDY L.J. I agree. I have nothing to add on the main part of the case. I understand that the respondents prefer an order to have the mark taken off the register. I only desire, speaking for myself, to express a doubt whether we have any jurisdiction now to direct a disclaimer.

A. J. Walter. I submit that we are entitled to have a disclaimer entered on the register.

COZENS-HARDY L.J. Sect. 74, sub-s. 2, says that the applicant for entry on the register of any such common particular as is mentioned in sub-s. 1 must disclaim "in his application." How can we make an order nunc pro tunc? I only wish to guard myself.

Warrington, K.C. It seems to have been decided in *In re Meeus' Application* (1) that the disclaimer must be made in and at the time of the application for registration and not afterwards; but there are authorities the other way. However, we submit to have our entire trade-mark struck out.

VAUGHAN WILLIAMS L.J. Then it is unnecessary to discuss that question now. The appeal is allowed, with costs, and the trade-mark must be expunged from the register. (2)

Solicitors: *Rowcliffes, Rawle & Co., for John Wall, Wigan; Robinson & Bradley; The Solicitor to the Board of Trade.*

(1) [1891] 1 Ch. 41.

(2) That the disclaimer must be made at the time of and in the application for registration, and cannot be made afterwards, was held by North J. in *In re Goodall's Trade-mark*, (1889) 42 Ch. D. 566 by Chitty J. in *In re Meeus' Application*, [1891] 1 Ch. 41, and by Kekewich J. in *In re Apollinaris Company's Trade-marks*, [1891] 2 Ch. 186, 212. But subsequent disclaimer was directed by Chitty J. in *Burland* v. *Broxburn Oil Co.*, 42 Ch. D. 274, 281; and see also other cases collected in Sebastian on Trade Marks, 4th ed. p. 354.—G. I. F. C.

G. I. F. C.

In re GRIFFIN.
GRIFFIN *v.* GRIFFIN.

C. A. 1901 Dec. 4.

[1901 G. 2088.]

Friendly Society—Life Policy—Assignment—Nomination—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-s.* 3—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 56, 57.

Policies effected under the Friendly Societies Act, 1875, and, *semble*, under the Friendly Societies Act, 1896, are assignable in the ordinary way as well as by nomination under the Acts.

Caddick v. *Highton*, [1901] 2 Ch. 476, n., and *In re Redman*, [1901] 2 Ch. 471, overruled on this point.

APPEAL from an order of Joyce J.

The only question raised by this appeal was whether a policy of assurance, effected by a member of a friendly society on his own life, is legally assignable by him in any other manner than by means of a nomination under the Friendly Societies Acts.

In May, 1894, George Griffin, a member of the Royal Liver Friendly Society, which was duly registered under the Friendly Societies Acts, effected a policy of assurance with the society for the sum of 30*l.*, payable on his death. The policy on the face of it was expressed to be made subject, amongst other things, "to the rules and tables of the said society hereunto annexed, and to any amendment or alteration thereof, and to any new rule or table or rules or tables hereinafter lawfully made."

The rules of the society which were referred to in the course of the argument were, so far as material, rule 1, which stated the objects of the society to be the raising, by voluntary subscriptions from the members thereof, funds for the following purposes mentioned in the Friendly Societies Act, 1875, s. 8, namely, "For insuring money to be paid on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member. For the relief or maintenance of members in old age. For the

C. A. 1901 GRIFFIN, *In re.* GRIFFIN *v.* GRIFFIN.

endowment of members or nominees of members, at any age, and for the relief of members in sickness by medical aid"; rule 32, which provided that every member, "or any person claiming through a member after such member's death," should produce a certificate of birth, or otherwise prove the age of a deceased member to the satisfaction of the committee of management; rule 41, which provided that upon the death of a member "the party claiming the assurance in respect of the deceased member" must produce at the registered office, or to the agent in the district wherein the death occurred, a certificate from the registrar of deaths; and rule 72, which was as follows: "The secretary shall keep a book in which any member may nominate in writing the person to whom the money assured by him, not exceeding 100*l.*, shall be paid on his decease, such person not being an officer or servant of the society, ... Any member may revoke such nomination by a written notice to that effect signed by himself, and it shall be the duty of the secretary to see the nomination erased. The member to pay 3*d.* to the management fund for each nomination or revocation."

In March, 1895, George Griffin assigned this policy to the plaintiff for valuable consideration. No nomination in accordance with rule 72 was ever made by George Griffin in respect of this policy.

In February, 1901, George Griffin died. In March, 1901, the plaintiff served the society with notice in writing of the assignment to him of March, 1895. In August, 1901, letters of administration to the estate of George Griffin were granted to his widow, the defendant.

Both the plaintiff and the defendant claimed the policy moneys; and in order to decide the rights of the parties the present action was commenced, in which the plaintiff applied for the appointment of a receiver of the policy moneys.

Joyce J., on November 23, 1901, without expressing any opinion of his own, but following *In re Redman* (1), in which Kekewich J. followed a prior decision by Phillimore J. in *Caddick* v. *Highton* (2), refused the application on the ground

(1) [1901] 2 Ch. 471. (2) [1901] 2 Ch. 476, n.

that, according to these authorities, a policy of this kind was not assignable except by means of a nomination.

The plaintiff appealed.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the appellant. There is no express prohibition against assignment in any of the rules, either those in force in 1894 or those in force now, and until the decision in *Caddick* v. *Highton* (1) the assignees of a member have been always recognised by this society as "persons claiming under a member."

The Friendly Societies Act, 1875, which was the Act in force when this policy was effected, contains no express prohibition against assignment; the inference that can be drawn from many of the phrases in several of the sections is in favour of assignment. In s. 4, "Persons claiming through a member" is defined as including "the heirs, executors, administrators, and assigns of a member, and also his nominees where nomination is allowed"; s. 18, sub-s. 1, provides for loans to members on the security of the policy, shewing that the assured can deal with it as part of his property; s. 21, sub-s. 2, recognises the right of "a person claiming through a member," that is an assign, to sue the society; s. 22 provides for disputes between assigns of a member and the society; and s. 25, sub-s. 8 (*e*), recognises other persons than members having claims against the society. The power to nominate under s. 15, sub-s. 3, is an additional facility given to members, but does not abrogate the general right of assignment. There is no question here between an assignee and a nominee. In every Act relating to friendly societies since 1829 persons claiming under a member have been recognised.

[They referred to 10 Geo. 4, c. 56, s. 37; 4 & 5 Will. 4, c. 40, s. 2, where "nominee" is first mentioned; 3 & 4 Vict. c. 73, s. 3, where "nominees" are again mentioned; 9 & 10 Vict. c. 27, which creates an investment fund which is not assignable; 13 & 14 Vict. c. 115, s. 12; 18 & 19 Vict. c. 63, ss. 24, 37, 40.]

Assignment is expressly forbidden in certain specified cases,

(1) [1901] 2 Ch. 476, n.

C. A. 1901 GRIFFIN, *In re.* GRIFFIN *v.* GRIFFIN.

as in 9 & 10 Vict. c. 27, and in Friendly Societies Act, 1875, s. 28, sub-s. 2, for insurances on children; but in other cases the Acts do not interfere with the general right of assignment which belongs to all property. The exemption of friendly societies out of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), is in favour of our contention, because these societies always had an inexpensive forum of their own.

[ROMER L.J. The jurisdiction of the High Court is not ousted in a proper case: *In re Royal Liver Friendly Society*. (1)]

[The Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), ss. 6, 8, and 9, and *Ashby* v. *Costin* (2) were also referred to.]

The Friendly Societies Act, 1896, contains no express or implied prohibition against assignment. [Sects. 56, 57, 58, 60, 68, and 106 were referred to.]

Bennett v. *Slater* (3), which was relied on in *Caddick* v. *Highton* (4), only shews that nomination excludes the general right of assignment pro tanto. There is no special rule in this case at all similar to the special rule in *Caddick* v. *Highton* (4); on that ground that decision is distinguishable, but, in so far as it tends to decide generally that these policies are not assignable, it cannot be supported.

Hughes, K.C., and *J. M. Gover*, for the respondent. True there is no express prohibition against assignment in any of the Friendly Societies Acts or the rules of the society affecting policies of that nature, but assignment is forbidden by implication: alienation is provided for by nomination only, under s. 15, sub-s. 3, to the extent allowed by nomination, otherwise the nominee and the assignee will have conflicting interests, and an assignment for value might be defeated by a subsequent nomination. The Legislature could never have intended that. The object of the Friendly Societies Acts was to enable the members to make provision for their families—not to enable them to raise money by assignment of their policies. These policies are the creatures of statute, and to the extent of the

(1) (1887) 35 Ch. D. 332.
(2) (1888) 21 Q. B. D. 401.
(3) [1899] 1 Q. B. 45.
(4) [1901] 2 Ch. 476, n.

amount allowed by nomination are assignable only by nomination, pursuant to s. 15, sub-s. 3, of the Act; in the present case the total amount secured by the policy is less than the amount allowed for nomination; the whole, therefore, of this policy is assignable only by nomination. The objects for which the society is formed, as stated in rule 1, or s. 8 of the 1875 Act, cannot be carried out if these policies are assignable. *Bennett* v. *Slater* (1) shews that the policy moneys are not the absolute property of the assured. The Policies of Assurance Act, 1867, by excepting friendly societies indicates that these policies were not intended to be assignable. *Caddick* v. *Highton* (2) is correct on this point. The right to the policy moneys on death is not the "property" of the assured in the ordinary sense: it is subject to the Acts and the rules of the society, and to the extent allowed by nomination is not assignable.

Younger, K.C., and *M. Romer*, for the trustees of the Royal Liver Friendly Society, took no part in the argument.

VAUGHAN WILLIAMS L.J. In this case the only question raised is whether or not a policy issued by a friendly society governed by the Act of 1875 is or is not assignable. I have come to the conclusion that it is assignable.

Primâ facie a policy, or the proceeds of a policy, are assignable by the person who has taken it out, and form part of the property of the member, or the estate of the deceased member as the case may be; and we therefore have to find something in the Act of 1875, or in the rules of the society, which prevents this particular policy having this ordinary incident of property.

Now, it is admitted here on both sides that there is nothing whatsoever express in either Act of Parliament or the rules which prevents the moneys payable under this policy, or the policy itself, from being assignable. If, therefore, the policy is not assignable, it must be from some implication arising under the statute. I do not propose to go through all the legislation upon the subject of friendly societies prior to 1875, or to deal with the arguments that Mr. Lawrence put forward, based

(1) [1899] 1 Q. B. 45. (2) [1901] 2 Ch. 476, n.

C. A. 1901 GRIFFIN, *In re.* GRIFFIN *v.* GRIFFIN. Vaughan Williams L.J.

upon the presence in those Acts of Parliament of words and phrases which seem to recognise the rights of persons, not members of the society, claiming through members of the society. I think it is more satisfactory to decide this case upon the interpretation of the Act of 1875; and really there has been brought forward in this case but one section of the Act of 1875 from which it could be argued that the statute takes away by implication the power to assign a policy issued by the society, and that is s. 15, sub-s. 3. That provides: "A member of a society (other than a benevolent society or working men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society, to whom any moneys payable by the society on the death of such member, not exceeding 50*l.*, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." It is said that we ought to draw the inference from that provision that the statute intended that this power of nomination should be the only mode of alienation of moneys under a policy issued by a friendly society governed by this statute.

I myself think we are not bound to draw any such conclusion, and that we ought not to draw it. I would point out, in the first place, that apparently sub-s. 3 is a section which is intended not so much to give a power of alienation as to give a testamentary power. It is a sub-section which enables the nominator to nominate a person to whom the moneys arising under the policy shall be paid at his decease.

That power is by the express terms of the Act of Parliament a revocable power, but it is revocable only in the way provided by the statute—that is to say, by delivering a particular notice to the society.

But one looks to see why it is suggested that this sub-s. 3 of s. 15 takes away the power of alienation. As I understand,

it is put somewhat in this way. It is said that there is an express provision in this Act of Parliament that the money shall be paid in accordance with this nomination, unless the nomination has been revoked; and then it is said that, if that is so, it might be that there is outside and beside the nomination an assignment, possibly an assignment for value, and that, having regard to the imperative words of this section, the money shall be paid in accordance with the nomination, unless it is revoked; this might be to put the nominator in a position whereby he could revoke a previous assignment for value, or could defeat the claim of an assignee. I do not know how that might be. It is said, I know, it is not likely that the Legislature meant to put the nominator or his assignee for value in such a position, and that the way to avoid that is to read sub-s. 3 as providing one express mode of alienation, and excluding all others; but, as I have already said, this question as to what might be the position of an assignee for value as against a nominee does not really arise in this case, and we have not to decide it. As far as my decision is concerned, I must be taken to decide that, whether or not that difficulty, or that hardship, or that strange position would arise, I cannot find sufficient in the Act of Parliament to make me say that by necessary implication the ordinary incident of property is taken away. I think that the policy of insurance and the moneys payable under it are assignable. In the particular case before us the policy was only a 30*l.* policy, and there was no nomination, and for that reason I decline to go into the question of what might be the state of things if the policy had been for a larger sum than 50*l.*, and there had been a nomination as to 50*l.*, and a surplus beyond. We have not to decide that question. All we have to decide here to-day is whether or not in the case of a policy for 30*l.*, there being no nomination, an assignment executed by the member of the society who took out the policy in his lifetime is effective to transfer to the assign the right to this 30*l.*, or whether it becomes part of his general estate; and I decide it is effective to transfer to the assign that policy, and the moneys under it.

C. A. 1901 GRIFFIN, *In re.* GRIFFIN *v.* GRIFFIN.

ROMER L.J. I agree. As the Lord Justice has pointed out, the policy moneys in question are primâ facie assignable. To make them non-assignable, you must find some legislative enactment to that effect, either express or arising by necessary implication. I can only say, after considering the various Acts to which our attention has been called, that I can find no such legislative enactment. The case is really governed by the Act of 1875, and, far from finding any express enactment in that Act prohibiting assignment, there are expressions used in that Act, and provisions in it, which seem to me to militate against the idea that assignment in this case was not recognised. There is, for example, the definition in s. 4 of persons claiming through a member, and it defines the expression in this way: it says it includes the heirs, executors, administrators, and assigns of a member, and also his nominees where nomination is allowed. Putting together in that definition both the assigns and the nominees seems to my mind significant. And you find that section followed up by several important sections where the expression I have referred to is used, as, for example, s. 21, sub-s. 2, which gives a right of suing the friendly society by a member, "or person claiming through a member." In legal proceedings, it says, which may be brought under this Act by a member, "or person claiming through a member," the society may be sued in a particular way.

Now, the chief section relied on by the respondents in this case as supporting their contention is s. 15, sub-s. 3. To my mind that section may one of these days give rise to questions of some difficulty, which fortunately do not arise on this appeal. And I should like for myself to keep my mind free to decide these questions when they come before us. I mean such questions as might arise if you found persons duly nominated by a member under the section, and other assignees, when difficulties would arise as between those nominees and the express assigns of the person who effected the policy. Also questions of this kind, as to whether, as between the member and his nominee, there might not have been provisions, enforceable on behalf of some persons, which had made the nominee a trustee. I am not

indicating any opinion one way or the other. I only say that these questions and similar questions may arise, and may have to be considered hereafter. In the case before us there has been no nomination: the member has not nominated any person to receive these policy moneys; so that the question is this: Is there anything in that s. 15, sub-s. 3, which would tend to shew, or shew by necessary implication, for there is nothing expressed, that, in a case where there are no nominees under the section, an assign for value, or an assign from the member in his lifetime, should have no legal position, and could not have his rights in any way recognised or enforced? I am bound to say I cannot myself find in this section any such necessary implication. It appears to me that, even giving the fullest rights to the nominees, it does not follow that in a case where there are no nominees there should not be a right to assignment, and that the assigns should have no rights whatever. The mere fact that nominees have been provided for by this sub-section does not in my opinion justify the argument or the conclusion that the Legislature had intended that no other persons claiming through a member should be recognised but these nominees. It may well be when such questions as I have before referred to come to be considered that it may be held that these nominees are really only in the nature of assigns—assigns claiming under what is equivalent to an assignment, which is revocable in a particular way, or that they are in the position only of assigns whose position, unless that position is revoked, is conclusive as between them and the society. It may well be that that is the proper view to take; I express no opinion upon it, for, as I have said, it does not arise here. But I can find nothing in the Act of 1875 that will justify this Court, even assuming that the nominees are in the position of persons who have titles for all purposes which negative, when they do exist, the rights of the assignees for value—even assuming that, I can find nothing that justifies the inference that when there are no such nominees you can have no other assignees at all.

I should like to say further with reference to the judgment of Phillimore J. in *Caddick* v. *Highton* (1), to which my attention

(1) [1901] 2 Ch. 476, n.

C. A. 1901 GRIFFIN, *In re.* GRIFFIN *v.* GRIFFIN. Romer L.J.

has been called, that I cannot see myself anything in the Policies of Assurance Act, 1867, which justifies the conclusion that Phillimore J. came to in the case I have referred to. All that the Policies of Assurance Act, 1867, did was this: to give the assignees of most policies the right to sue on those policies at law. It excepted the policies of the class we have to consider on this appeal; but it appears to me that might well have been because, if the last-mentioned policies were not excepted, it might have justified the argument that those policies could have been sued on in the ordinary way without being hampered or hindered in any way in the ordinary Courts of law, whereas we know, from the course of legislation on the subject of friendly societies, that provisions more or less of a stringent character have been made to settle disputes before special tribunals; and I need not say now that those provisions compel disputes to be settled in a special way, and only render them enforceable in special cases. But it may well be that the Legislature in passing the Act of 1867 did not want to throw any doubt on the efficacy of those provisions in the case of policies of the kind we have to consider in this appeal.

Lastly, I can only say that I cannot find for myself anything in the case of *Bennett* v. *Slater* (1) which would justify us in allowing the contention of the respondents on this appeal. And for those reasons I agree in thinking that the appeal should be allowed.

COZENS-HARDY L.J. I agree. This is really an appeal from Phillimore J.'s decision in *Caddick* v. *Highton*. (2) He there decided that policies of this nature cannot be assigned; they can only be disposed of by nomination; and unless and in so far as they are so disposed of they vest both legally and beneficially in the legal personal representative.

In order to establish that, it is important to remember how to approach an Act like the Friendly Societies Act, 1875. You do not want to find any clause enabling assignments to be made. You must find, if Phillimore J.'s view is correct, some words preventing the owner of the property from

(1) [1899] 1 Q. B. 45.

(2) [1901] 2 Ch. 476, n.

disposing of that which did not belong to anybody else. I do not find any such words in this case. I will not go through the sections my learned brothers have gone through, but I mention s. 18, sub-s. 1, which seems to me strong to shew that the owner of the policy can deal with it as part of his property. It provides a mode in which the funds of the society may be invested, and the Legislature has said in effect the funds of this society may be lent to members on personal security with two satisfactory sureties to the amount of half the value of the policy; and you may deduct the amount due on the loan from the policy when it matures. That seems to me consistent, and only consistent, with a view that this is part of the property of the assured.

Then reliance was placed on *Bennett* v. *Slater* (1); but *Bennett* v. *Slater* (1), when carefully considered, does seem to me to be a strong authority in support of the view that this is property subject to assignment; for the Lords Justices there held that, although so long as there was a nomination in force and unrevoked, the will of the assured had no operation on the policy, yet if it had been revoked the policy would have formed part of his estate, and been subject to his disposition by will.

We are not met here with the more difficult problem Phillimore J. had to deal with—of assignment for value followed by nomination. I desire, as my learned brothers have, to keep that an open point. Here, where there was no nomination, and we have nothing but the policy, the assignment, and the death of the assured, I have no doubt the assignment was perfectly good.

Solicitors: *Pritchard, Englefield & Co., for J. J. Lambert, Manchester; R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester; Rowcliffes, Rawle & Co., for Bremner, Sons & Corlett, Liverpool.*

(1) [1899] 1 Q. B. 45.

W. C. D.

C. A. 1901 Dec. 7, 9, 10.

BAGOT PNEUMATIC TYRE COMPANY *v.* CLIPPER PNEUMATIC TYRE COMPANY.

[1899 B. 4956.]

Contract—Privity of Contract—Contract with Promoter for Benefit of intended Company—Ratification—Adoption—Agreement to grant to Promoter and that he or intended Company should accept Licence to use Patent—Right of Grantee to enforce Agreement against Company when formed.

On March 3, 1897, the plaintiffs agreed to grant to Phelps, and he agreed that he or a company then being formed by him should accept, an exclusive licence to use some patents belonging to the plaintiffs. The consideration for the grant was to be that (after providing for payment to the shareholders of the company in each year a cumulative preference dividend of 8 per cent. on a capital of 150,000*l.*, and setting aside such sum as the directors should think fit as a reserve fund) the company should pay to the plaintiffs in each year out of their remaining profits available for dividend 8 per cent. upon a fixed capital of 150,000*l.*, and that after payment of these sums the plaintiffs should be entitled to receive one-half of the balance (if any) of net profits of the company available for dividend in each year.

On March 4, 1897, the plaintiffs granted the exclusive licence to Phelps. The licence contained a recital of the agreement of March 3, and was expressed to be made in consideration of that agreement and of the payment therein agreed to be made by the licensee to the plaintiffs.

By an agreement dated March 5, 1897, between Phelps (as vendor) and one Piercy, for and on behalf of the intended company, after a recital of the agreement of March 3 and the licence of March 4, it was agreed that Phelps should sell and the company should purchase the full benefit of the licence and the agreement of March 3 for the consideration therein mentioned.

The intended company was registered on March 8, 1897.

By an agreement dated April 8, 1897, between Phelps, Piercy, and the company, it was provided that the agreement of March 5 should be adopted by the company and should be binding on Phelps and the company in the same manner as if the company had been in existence at the date thereof, and had by the agreement of April 8 ratified the same.

The company made some use of the licence, though it was never actually assigned to them by Phelps.

The plaintiffs brought an action against the company to enforce the performance by them of the provisions of the agreement of March 3:—

Held, that assuming that the plaintiffs were entitled to sue the defendants upon that agreement, yet upon its true construction nothing had

become due to the plaintiffs which had not been paid to them, and consequently that no cause of action had arisen:

Held, also, that there was no privity of contract between the plaintiffs and the defendants, and therefore no legal right of action by the former against the latter.

And, *per* Vaughan Williams L.J.: The plaintiffs had not, by reason of their having taken the benefit of the agreement of March 3 and the licence, any equitable right to sue the defendants.

Per Romer L.J.: *Semble*, that in case any money should thereafter become due to the company under the agreement of March 3, the plaintiffs might possibly have some remedy by obtaining leave to use the name of Phelps in proceedings against the company or otherwise.

Decision of Kekewich J., [1901] 1 Ch. 196, affirmed.

Werderman v. *Société Générale d'Electricité*, (1881) 19 Ch. D. 246, explained and distinguished.

APPEAL against the decision of Kekewich J. (1)

The plaintiffs brought the action to enforce against the defendants the provisions of an agreement dated March 3, 1897, made between the plaintiffs and J. C. Phelps. By this agreement, after a recital that the plaintiffs were entitled to certain patents set out in the 1st schedule thereto, it was agreed that the plaintiffs should grant to Phelps, and that he or the company thereinafter mentioned should accept, an exclusive licence to use the patents in the form set forth in the 2nd schedule thereto. The consideration for the grant of the licence was to be as follows: (*a*) (after providing for payment to the shareholders of a company in the course of formation by Phelps in each year of a cumulative preference dividend equal to 8 per cent. on a capital of 150,000*l.*, and after such sum as the directors of the company should think fit should have been set aside as a reserve fund) the company should pay to the grantors in each year out of their remaining profits available for dividend a sum equal to 8 per cent. upon a fixed capital of 150,000*l.*; (*b*) after providing for payment of the above sums the grantors should be entitled to receive a further sum equal to one-half of the balance (if any) of net profits of the company available for dividend in each year; (*c*) the grantors should accept the certificate of the auditors of the company in all matters of account and net profits of the company available for dividend.

(1) [1901] 1 Ch. 196.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY.

The grantee was to have the right of assigning the agreement and the licence referred to therein to the company then in course of formation, and, upon the adoption thereof by that company, the same should be as binding and effective as if the company had been named therein in lieu of the grantee.

On March 4, 1897, the plaintiffs granted to Phelps a licence in the specified form. This licence, after a recital of the fact that the agreement of March 3, 1897, had been entered into, was expressed to be made in consideration of that agreement and of the payment therein agreed to be made by the licensee to the licensors, and it contained a covenant by the licensee not to assign the licence without the consent of the licensors, except to the intended company.

By an agreement dated March 5, 1897, between Phelps (described as the vendor) of the one part, and Ernest Piercy for and on behalf of the intended company, of the other part, after a recital of the agreement of March 3 and the licence of March 4, it was agreed that the vendor should sell and the company should purchase the full benefits of and under (inter alia) the licence of March 4 and the agreement of March 3 for 120,000*l.*, of which 60,000*l.* was to be paid in cash, and the balance in cash or shares at the option of the directors of the proposed company. It was also provided that the company should undertake all the obligations and liabilities imposed on the purchaser under the agreement and licence, and should indemnify the vendor against those obligations and liabilities.

The intended company was registered on March 8, 1897, and was the defendant company.

On April 8, 1897, an agreement was entered into between Phelps, Piercy, and the defendant company, under the seal of the latter, by which it was provided that the agreement of March 5, 1897, should be adopted by the defendant company, and should be binding on Phelps and on the company in the same manner and take effect in all respects as if the company had been in existence at the date thereof and had by the agreement of April 8 ratified the same, and that Piercy should from thenceforth be discharged from all liability under or in respect of the agreement of March 5. The price to be paid was modified

to this extent, that 40,000*l.* was to be paid in cash and the balance in fully paid shares of the company.

The licence, though used to some extent by the defendants, was never actually assigned to them by Phelps.

In March and September, 1898, the defendants issued balance-sheets shewing a profit, but no amount was placed to reserve fund, and no dividend was declared. In October, 1899, they issued a balance-sheet shewing large profits, out of which a sum was carried to reserve fund and a sum of 3000*l.* was written off as depreciation and towards the extinction of the "cost of licences and contracts." A circular was about the same time sent to the plaintiffs, stating that the year's trading of the defendants allowed a dividend of 6 per cent. to the defendants' shareholders, and that they proposed in future to provide out of profits for the depreciation and ultimate extinction of the item of 138,000*l.*, the sum at which, by additions, the licences, &c., stood in the balance-sheet.

The plaintiffs then brought this action claiming a declaration, among other things, that the defendants were not entitled to write off against profits any sums for depreciation, and claiming to have the dividend for the year covered by the balance-sheet ascertained.

The defendants by their defence alleged that the statement of claim disclosed no cause of action by the plaintiffs against the defendants.

Kekewich J. dismissed the action on the ground that there was no direct privity of contract between the plaintiffs and the defendants, and that no contract between them could be inferred. In his opinion the case was governed by *In re Northumberland Avenue Hotel Co.* (1), and *Howard* v. *Patent Ivory Manufacturing Co.* (2) and *Werderman* v. *Société Générale d'Electricité* (3) were both distinguishable.

The plaintiffs appealed.

Haldane, K.C., Warrington, K.C., and *E. F. Spence*, for the plaintiffs. It is submitted that the decision of Kekewich J. was

(1) (1886) 33 Ch. D. 16. (2) (1888) 38 Ch. D. 156.
(3) 19 Ch. D. 246.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY.

erroneous, on the ground (1.) that there was a new contract between the plaintiff company and the defendant company; or (2.) that Phelps in entering into the contract of March 3 was a trustee or an agent for the defendant company; or (3.) that the defendants, having taken the benefit of the agreement of March 3 and the licence, are in equity bound to accept the burden. The agreement of March 3 itself plainly shews that it was contemplated by the parties that Phelps should be a mere conduit pipe to the intended company. It was intended that the company when incorporated should take the benefit and bear the burden of the agreement of March 3. The consideration mentioned in the agreement could only be paid by the defendant company, and it was of the essence of the transaction that the defendant company should enter into a new contract with the plaintiff company to the effect of the contract of March 3. It must be inferred that such a contract was entered into. Kekewich J. based his judgment upon *In re Northumberland Avenue Hotel Co.* (1) That case is distinguishable from the present case, for there the company acted under the erroneous assumption that they were bound by the contract with the promoters, but they had not themselves entered into any contract at all. Here the defendant company did enter into a contract with Phelps and Piercy, and they adopted the contract of March 5 between Phelps and Piercy acting on behalf of the defendant company. The acts of the defendant company amount to an admission that they contracted with Phelps as agent for the plaintiff company. The erroneous assumption made by the defendants was as to the person with whom they had contracted; there was no error as to the existence of some contract. *Howard* v. *Patent Ivory Manufacturing Co.* (2) applies, and shews that a new contract ought to be inferred. Then, as to the equity which results from the defendants taking the benefit of the agreement of March 3 and the licence, *Werderman* v. *Société Générale d'Electricité* (3) applies. In that case the Court did in effect enforce the performance by the defendants of a positive covenant. The Court held that a covenant by the

(1) 33 Ch. D. 16. (2) 38 Ch. D. 156.
(3) 19 Ch. D. 246.

assignee of a patent that the assignor should be entitled to receive a share of the profits arising from the patent was in effect a charge upon the patent which was binding on any one who took the patent with notice of the covenant. That applies to the present case. The equitable doctrine as to the enforcement of covenants which impose a burden on land is explained in Pollock on Contracts, 6th ed. pp. 228 et seq., where it is shewn that *Tulk* v. *Moxhay* (1) established an exception from the law that you could not impose new burdens on land. But this equitable jurisdiction is limited to negative covenants and is strictly personal. In *Werderman* v. *Société Générale d'Electricité* (2) the Court treated the question as being whether it was part of the bargain for the assignment of the patent that the profits should be disposed of in a particular way, and they held that no one taking with notice of that bargain could avoid the liability. That is a clear authority in favour of the present plaintiffs. A licence to use a patent amounts to a contract to allow the licensee to use the patent without being liable to an action for infringement: *Bower* v. *Hodges*. (3) An exclusive licence without a grant is simply an authority to do lawfully that which would otherwise have been unlawful: *Heap* v. *Hartley*. (4) The agreement of March 3 is one of the terms of the licence.

On the question whether, assuming that the plaintiffs were entitled to sue the defendants, the plaintiffs could make out a case for relief, Kekewich J. was in favour of the plaintiffs. He thought they would have been entitled to some relief. The defendants are, no doubt, entitled to set aside part of the profits for the purpose of a reserve fund; they are not entitled to set aside any part as a depreciation fund, and, at any rate, not for the purpose of writing off the amount paid for the licence, which will come to an end.

Neville, *K.C.*, and *Sargant*, for the defendants. "Profits available for dividend" means the balance of profits after setting aside a reserve fund to meet contingencies: *Fisher* v. *Black and White Publishing Co.* (5) "Available for dividend" is a

(1) (1848) 2 Ph. 774.
(2) 19 Ch. D. 246.
(3) (1853) 22 L. J. (C.P.) 194.
(4) (1889) 42 Ch. D. 461.
(5) [1901] 1 Ch. 174.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY.

limitation of the word "profits." The decisions in *Lee* v. *Neuchatel Asphalte Co.* (1) and *Verner* v. *General and Commercial Investment Trust* (2) are of course binding on this Court in any case in which the facts are identical, though they created much surprise at the time. There is no distinction between a patent which is of limited duration and machinery which is gradually wearing out. It is immaterial whether the fund which is set apart out of profits is called a "sinking fund" or a "depreciation fund." The plaintiffs do not complain that the defendants are parting with any money which they ought to have retained; the complaint is that they are keeping in hand too much. There is really nothing due to the plaintiffs at present. On this ground the action must fail, and the point of law on which Kekewich J. based his decision is purely academical.

[ROMER L.J. referred to *Touche* v. *Metropolitan Railway Warehousing Co.* (3)]

The decision in *Werderman* v. *Société Générale d'Electricité* (4) was upon demurrer, and the Court had only to decide whether there was any possible equity to support the bill. The judgment of Lindley L.J. was based upon there being a charge upon the patent in favour of the plaintiff. If that were so, the demurrer must necessarily fail. But it by no means followed that there was a personal liability of the defendants. The present defendants have no objection to the plaintiffs having a charge on the patent, but they deny that anything is now due to the plaintiffs. Rent is the only exception to the general legal rule that an assignee is not liable upon the covenant of his assignor. The legal assignee of a lease while he is in possession of the demised premises is liable to the assignor for rent. That is a legal, not an equitable doctrine. But an equitable assignee is not liable to the lessor for rent or on the covenants in the lease: *Cox* v. *Bishop.* (5) That principle applies to the present case. If this were not so, the decision in *In re Northumberland Avenue Hotel Co.* (6) would have been different. The nature of a charge on land for rent is illustrated

(1) (1889) 41 Ch. D. 1.
(2) [1894] 2 Ch. 239.
(3) (1871) L. R. 6 Ch. 671.
(4) 19 Ch. D. 246.
(5) (1857) 8 D. M. & G. 815.
(6) 33 Ch. D. 16.

by *Pertwee* v. *Townsend.* (1) Here nothing has yet become due to the plaintiffs, and the defendants may never be the owners of the patent.

[ROMER L.J. referred to *In re Empress Engineering Co.* (2)]

There was no relation of trustee and cestui que trust between Phelps and the defendant company.

In *Touche* v. *Metropolitan Railway Warehousing Co.* (3) Walker, the alleged trustee for the plaintiffs, was a party to the action; and it was held that he was not personally liable to the plaintiffs, but that the defendant company was liable to pay him, and that the plaintiffs could not be paid until Walker had actually got the money. Phelps was not a "conduit pipe": he was a vendor to the defendant company. He sold to the company for a substantial consideration—120,000*l.*—the company agreeing to indemnify him against all liabilities to the plaintiff company under the agreement of March 3, 1897, and the licence. It cannot be said that the contract of March 5, 1897, between Phelps and Piercy, was a contract made on behalf of the plaintiff company, and that therefore that company, as principals, are entitled to take advantage of it; for the agreement did not state that Phelps was acting on behalf of the plaintiff company as principals, and therefore it could not be ratified by that company so as to enable them to sue upon it: *Keighley, Maxsted & Co.* v. *Durant.* (4) To enable the plaintiff company to succeed it is necessary that they should prove facts establishing such a contractual relationship between Phelps and the two companies as will make the contracts binding on both companies. Such facts have not been proved or even pleaded. The plaintiffs are trying to set up at the same moment two facts which are inconsistent with each other; for they say that Phelps was a trustee for the plaintiffs, and then that he was contracting at arm's length with both the plaintiffs and the defendants.

[VAUGHAN WILLIAMS L.J. It is clear there was no novation: there is nothing like a novation.]

No; novation cannot arise unless you say in terms "I novate."

(1) [1896] 2 Q. B. 129.
(2) (1880) 16 Ch. D. 125.
(3) L. R. 6 Ch. 671.
(4) [1901] A. C. 240.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY.

Assuming, then, that there is no novation, what is there on the facts to prove that Phelps was a trustee for the plaintiff company? Nothing whatever. *Werderman* v. *Société Générale d'Electricité* (1) does not take the plaintiffs far enough. There is not here, as there was in that case, an intention that there should be obligations attaching to and running with the licence. An equitable assignee of leaseholds is not liable ratione tenuræ to the landlord: *Cox* v. *Bishop* (2); and the decision in the *Werderman Case* (1) was never intended to attach to a patent a greater obligation than to an equitable assignment of leaseholds.

Warrington, K.C., in reply. It is true that *Werderman* v. *Société Générale d'Electricité* (1) was decided on demurrer, but there was no general demurrer for want of equity: the demurrer was on the ground of "no privity," and it was decided just as on a preliminary point of law—whether there was a privity, and the Court held that there was a privity between the plaintiff and the defendant company; and so, it is contended, there is here.

Dec. 10. VAUGHAN WILLIAMS L.J., after stating the facts, continued:—The defendant company say that, according to the true construction of the agreement of March 3 between the plaintiff company and Phelps, there are now no available profits out of which the 12,000*l.* a year can be paid to the plaintiff company. The plaintiff company take a different view of this matter, and thereupon they have brought this action against the defendant company. The larger question raised is this: the defendant company say that there is no direct contract between the plaintiff company and themselves—in other words, that there is no such privity of contract as enables the plaintiff company to sue them. The further question is raised, whether, upon the true construction of the agreement of March 3, there are, or had been prior to the commencement of this action, any "profits available" within the meaning of that agreement for the payment of any sum to the plaintiff company which has not been duly paid.

(1) 19 Ch. D. 246. (2) 8 D. M. & G. 815.

I will deal first with the wider question. Regarding the matter merely as a question of law, there can, in my judgment, be no doubt whatever that there is not here any direct contract between the plaintiffs and the defendants which would enable the former to sue the latter or would create any privity of contract. There is really no question about this part of the case, and no one denies that the case of a reversioner and an assignee of a lease is the only exception at law to the general rule that you cannot sue upon a contract persons who are not parties to it in some shape, either by name or by agency. Then it is suggested that, although the Bagot Company cannot sue the Clipper Company on the contract of March 3, yet there is evidence of a new contract having been entered into between the Bagot Company and the Clipper Company upon the same basis as the agreement of March 3.

It is not alleged that there has been any new contract by writing or by any resolution of the Clipper Company communicated to the Bagot Company. But it is suggested that a new contract was entered into by implication from the conduct of the parties. A suggestion of this kind was made and was rejected in *In re Northumberland Avenue Hotel Co.* (1) It is said that a similar suggestion was made, and in different circumstances was accepted, in *Howard* v. *Patent Ivory Manufacturing Co.* (2) As regards this suggestion, in the first place, I do not think that the statement of claim in the present case really alleges or suggests any such implied contract. But, even if it does, it seems to me that there is no evidence of any such a contract having been entered into. It is quite true that many things have been done by the defendant company which they might well have done if they had been parties to the agreement of March 3. But the answer to that is, that all those acts were equally referable to the contract of March 5, and were equally consistent with the obligation of the defendant company towards Phelps under that contract. In my judgment, there is no ground for saying that there is evidence of such an implied contract.

That being so, only one other ground is suggested for saying

(1) 33 Ch. D. 16. (2) 38 Ch. D. 156.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY. Vaughan Williams L.J.

that the defendants are directly liable to the plaintiffs. And, as I understand it, the suggestion is this, that the defendants are liable to the plaintiffs, not in law, but in equity, because, though the contract of March 3 was not made with the defendants, and the licence of March 4 was not granted to them, yet they have had the benefit of the licence and have been acting under it. This, it is said, makes them in equity directly answerable to the plaintiffs. They have, it is said, received the benefit which has resulted from a contract to which they were not parties, and they have thereby taken upon themselves the burden of that contract. To my mind that has never been the law. It seems to me, without going at any length into it, that this question was clearly decided in *Cox* v. *Bishop*. (1) In that case Knight Bruce L.J. in his judgment (2) said: "The substantial question upon this appeal is whether an equitable assignee of a legal term of years granted in mines, or mines and other hereditaments, under a reserved rent and certain covenants, is liable to be sued in equity by the lessor for rent which became due and damages in respect of breaches of some of the covenants committed during the time that the assignee was in the possession and enjoyment of the demised property as the equitable assignee of it, which he has now ceased to be. There is not any special or any other special (*sic*) circumstance in the case that is in my view material. It was properly conceded, on the part of the respondents, that the liability would not have existed but for the possession or enjoyment of the property under the equitable assignment. It appears, however, to me, I acknowledge, that the possession and enjoyment make no difference. They do not, in my opinion, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter." And the judgment of Turner L.J. was to the same effect. In my opinion, that principle applies in the present case, and indeed in all similar cases. If the principle was rightly applied in the case of an equitable assignee of a lease, it seems to me that a fortiori it must apply in a case in which

(1) 8 D. M. & G. 815. (2) 8 D. M. & G. 822.

that which is taken possession of and enjoyed is not land but a personal chattel. The principle so laid down in *Cox* v. *Bishop* (1) was not a new one. In *Moore* v. *Greg* (2) Lord Cottenham L.C., although it was not essential to his decision, expressed an opinion in substance the same as that which Knight Bruce L.J. expressed in *Cox* v. *Bishop*. (1)

The only other matter with which I have to deal on this part of the case is the decision in *Werderman* v. *Société Générale d'Electricité*. (3) That case was decided by Jessel M.R. and Lush and Lindley L.JJ. The result, it is said, of that decision is this, that when there is as between A. and B. an agreement which effects the transfer of property from A. to B., if afterwards a third person obtains from B. the possession and enjoyment of the property with notice of the bargain between A. and B., that third person who has had the possession and enjoyment of the property is under an obligation to perform the conditions of that which formed the consideration for the contract of which he had notice at the time when he took the possession and had the enjoyment, and may be sued by A., to whom that consideration was granted under the original contract, even though he was not a party to that contract. In my opinion, *Werderman* v. *Société Générale d'Electricité* (3) did not decide anything of the kind. If it did it would be in direct conflict with *Cox* v. *Bishop*. (1) If the judgments in *Werderman* v. *Société Générale d'Electricité* (3) are looked at carefully, I think it will be seen that all that is decided by that case is this, that if you had notice of a contract between the person under whom you claim property, real or personal, and a former owner of the property, whereby a charge or incumbrance was imposed upon the property of which you thus take possession and have the enjoyment, you take the property subject to that charge or incumbrance, and can only hold it subject thereto. But that proposition does not, as it seems to me, involve the consequence that the assignee of the property is liable to be sued for non-performance of the terms contained in the contract to which he was not a party. In my opinion,

(1) 8 D. M. & G. 815. (2) (1848) 2 Ph. 717.
(3) 19 Ch. D. 246.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY. Vaughan Williams L.J.

the utmost length to which that case goes is to impose an incumbrance on the property: it does not impose upon the person who has been in possession and enjoyment of the property any obligation to perform the terms of a contract to which he was not a party. Under the circumstances of the present case, I think there is no ground for saying that there is privity of contract between the plaintiff company and the defendant company, or that there is any direct contract between them, whether in writing or by word of mouth, or to be implied by conduct. This practically disposes of the case.

But I ought perhaps to say a word upon another matter. It is conceded that at the commencement of this action there was no sum of money which under the terms of the contract of March 3 had become payable to the plaintiff company and had not been paid. This being so, it seems to me that, quite apart from the question of privity of contract, this action must have failed, as being prematurely brought. Kekewich J. thought that, apart from the question of privity of contract, there was a present cause of action at the time of the issue of the writ, which rendered it necessary to decide the question of privity of contract. But, speaking for myself, I am inclined to think that, even if there had been privity of contract, still, in the circumstances, there would have been no immediate cause of action at the time when the writ was issued, whether a cause of action may or may not have arisen afterwards between the plaintiffs and the defendants.

ROMER L.J. I will first say a few words upon what I may call the merits of the case, that is, the pecuniary question involved in it, namely, whether the defendant company have earned profits which are "available for dividend," within the meaning of the agreement of March 3, 1897, or whether they are dealing with their income in a manner not justified by that agreement, assuming it to be binding on the defendant company. That question narrows itself in substance to this: Were the defendant company justified in doing what they did by their balance-sheet in 1899, namely, in writing off 3000*l.* in respect of depreciation in the value of licences, &c.? In my

opinion, the company were entitled to write off that amount. There is no question of bad faith. It is not said that the licences belonging to the company had not become depreciated in value below the amounts at which they stood in the company's books, or that, if the company were entitled to make any allowance for the falling off in value, 3000*l.* was an improper sum to allow for depreciation in that year. It is said that as a matter of principle the company were not entitled as against the plaintiff company to make any allowance in respect of the depreciation of the property in question, assuming, that is, the plaintiff company to have rights directly against the defendant company under the agreement of March 3. I cannot agree that on that footing the plaintiff company had any right even to say that the defendant company could not properly apply out of their income for the year this sum of 3000*l.* before ascertaining the net profits "available for dividend." In my opinion, the agreement of March 3 was not intended to deprive the defendant company of their ordinary right of ascertaining in the proper course of business and in good faith the profits of the company "available for dividend" in any particular year. In my judgment, if the defendant company, acting intra vires, in good faith and in a due and proper course of business, make certain payments out of their income before ascertaining the profits of the year "available for dividend," the plaintiff company would have no right to interfere. It appears to me that the defendant company had not only a right before saying what profits were "available for dividend" in the year 1899 to write off 3000*l.* for depreciation in the value of their licences, but in adopting this course they were only doing that which was right and honest. Possibly if they had not done this, but had included the 3000*l.* as part of the moneys available for dividend in the year, they could not have been restrained by injunction. That is possible. The whole question of the right of a company to divide profits in any one particular year without making good previous losses of its assets is really awaiting an authoritative judgment of the House of Lords. But, assuming that the defendant company could not be restrained from

C. A. 1901

BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY.

Romer L.J.

dividing the 3000*l.* as profits, if they thought fit to do so, I cannot see that the plaintiff company have any right to complain, when it is an ordinarily reasonable and proper course in the due conduct of the company's business to deduct this sum before distributing the profits by way of dividend. I think that the plaintiff company, even assuming that the defendants are liable to them, are bound by what the defendants have done under the circumstances.

Two other items were challenged by the plaintiffs, but I need not deal with them in detail. It is sufficient to say that the plaintiff company have not established that the sums in question have not been properly deducted by the defendant company from their income before ascertaining the profits "available for dividend."

This conclusion really renders the discussion of the legal points which arise merely academic, for not only are there no profits available for dividend, but in all human probability there never will be any profits available for dividend which would in anywise benefit the plaintiff company. Theoretically, however, there might be. And to a certain extent I agree that the plaintiffs are right in saying that, if there was a direct contract between the two companies, it would not be proper to allow the judgment of the Court below to stand, and merely to dismiss the action on the ground that no money is now payable to the plaintiffs. For the defendants have repudiated the existence of such a direct contract, and therefore I think we ought to go into the legal questions which arise, at any rate to the extent of endeavouring to ascertain whether there was or was not a direct contract between the plaintiff company and the defendant company. In my opinion, there was no such direct contract. There was clearly a contract between the plaintiff company and Phelps, and there was just as clearly a contract between Phelps and the defendant company, and each of these was a direct contract. Phelps was not a mere shadow, or a nominee or trustee. He was a direct contracting party who had a direct interest in his contract with the plaintiff company. He was also a fresh contractor who had other rights under his contract with the

defendant company. Looking at those contracts, it appears to me impossible to say that by virtue of them any contract was created between the plaintiff company and the defendant company. Was there any other contract entered into by the defendant company? In the first place, no such other or further contract is even pleaded in the plaintiffs' statement of claim. But I should be sorry to treat the case as a mere matter of pleading. Dealing with it as a question of substance, I cannot find sufficient, or indeed any, real evidence of any contract having been made directly between the defendant company and the plaintiff company. All that has been done by the defendant company appears to me plainly referable to their express contract with Phelps, and to that contract alone. Nothing, so far as I can see, has been done by the defendant company which would justify us in holding that a fresh contract has arisen between the plaintiff company and the defendant company. The user, e.g., of the patented inventions, is, to my mind, explainable by the right of the defendant company under their contract with Phelps alone. Phelps being, as between himself and the plaintiff company, by his contract with them the exclusive licensee of the patented inventions, could, and in my view did, by his contract with the defendant company authorize them to use those inventions. I may add that the defendant company are not in fact the actual assigns of the licence, and the fact that they are equitable assigns by contract with Phelps would not of itself give the plaintiffs any special right to sue the defendants, as was pointed out in *Cox* v. *Bishop*. (1)

In my opinion, there was no direct contract between the plaintiffs and the defendants which entitles the plaintiffs to sue the defendants directly in the absence of Phelps. But it must be distinctly understood that I do not in any way suggest that, in the unforeseen event of profits arising hereafter, the plaintiff company may not have rights against Phelps or a right to use Phelps's name in proceedings which would enable them in some shape or form to recover a share of the profits, or that the plaintiff company in such an event might not in proper

(1) 8 D. M. & G. 815.

C. A. 1901 BAGOT PNEUMATIC TYRE COMPANY v. CLIPPER PNEUMATIC TYRE COMPANY. Romer L.J.

proceedings to which Phelps was a party have some rights and remedies. Phelps is not a party to the present proceedings, nor is the case one in which leave to amend ought to have been granted, even if it had been asked, so as to raise a different issue from that which has been raised by the plaintiffs, for, as I have already pointed out, there are, as matters now stand, no merits to be decided. There is no money now payable, or, so far as I can see, ever likely to be payable, to the plaintiff company by the defendant company. So that it would not be right to give leave to amend merely for the purpose of raising what is practically an academic question. Nor do I intend to prejudice any claim which the plaintiffs might possibly have, in the unforeseen event of there being profits, to participate in those profits by reason of the principle of the decision in *Werderman* v. *Société Générale d'Electricité*. (1) But that principle, even if applied here, would not in my opinion establish any personal contract between the defendant company and the plaintiff company. And I cannot find any repudiation by the defendant company of any liability which has been cast upon them by reason of their contract with Phelps. This being so, I think the appeal fails for the reasons which I have stated. But care should be taken that the judgment which is drawn up carries out the intention of this Court.

COZENS-HARDY L.J. I agree, and I have nothing to add.

VAUGHAN WILLIAMS L.J. The appeal will be dismissed with costs.

Solicitors: *Capel-Cure & Ball; Beale & Co.*

(1) 19 Ch. D. 246.

W. L. C.

PALMER *v.* CONSERVATORS OF THE RIVER THAMES.

KEKEWICH J.

1901

Nov. 20, 21.

[1900 P. 1539.]

Thames—Conservators—Navigation—Dredging—Riparian Owner—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 83, 87.

The Thames Conservators have no power under the Thames Conservancy Act, 1894, to grant a licence to dredge the upper Thames upon the terms that the licensee may sell the soil so raised for his own benefit.

THE plaintiff was the owner of two several fisheries, and of the soil of the river, in the upper Thames, near Boulter's Lock, Maidenhead. By his statement of claim he alleged that on June 27, 1900, and at divers other times the defendant, William Henry Edwards, by the licence and with the authority of the defendants, the Thames Conservators, wrongfully broke and entered the said several fisheries and soil of the plaintiff, and therein dredged and carried away a large quantity of soil, sand, and ballast for sale, and sold the same to the injury of the plaintiff, and he claimed an injunction to restrain the defendants from dredging and taking ballast, soil, and sand for sale from the said fisheries and soil.

By an instrument called a dredging licence, dated January 21, 1900, the conservators, purporting to act under the powers granted to them by the Thames Conservancy Act, 1894, appointed Mr. Edwards, their agent, to raise gravel, sand, or ballast in his punt called the *Perseverance* from the bed of the river Thames from January 11, 1900, to December 31, 1900, subject to the restrictions and regulations printed on the other side thereof, and the said Edwards was thereby further authorized and permitted to carry away and sell or otherwise dispose of the gravel, sand, or ballast thereby obtained. The licence also contained a note warning the holders of dredging licences that any infringement of the conditions of their licence would subject them to forfeiture of the licence and to prosecution before a magistrate. The conditions (so far as material) provided as follows: "(1.) No dredging is permitted except for

KEKEWICH J.

1901

PALMER v. THAMES CONSERVATORS.

the following purposes: (*a*) Reducing or removing shoals, shelves, or banks, or other accumulations in the river Thames; (*b*) deepening or otherwise improving the bed and channel of the said river; (*c*) maintaining, improving, and freeing or keeping free from obstruction the navigation thereof. (4.) That the person holding this licence shall not commence to dredge until he shall have received a permit from the engineer to the conservators authorizing him to do so, and indicating the precise places in which he is so permitted to dredge, and the period within which such permit is valid. (5.) That the person holding this licence shall not dredge in any part of the river except that for which he shall have obtained the written permission of the engineer nor for longer than the time mentioned in such permit, and he shall immediately desist from dredging in any part of the river for which he may have obtained such permission upon being required so to do by any officer of the conservators. (6.) That the dredging be strictly confined within the limits and to the depth stated on the permit granted by the engineer to the conservators. (7.) That no dredging be executed in the river between sunset and sunrise. (8.) That this licence be forfeited on the infraction or evasion of any of the above conditions. (9.) The licensee shall only be considered the agent of the conservators whilst strictly exercising the powers conferred upon him by this licence. The relationship of agent shall cease immediately upon infraction or evasion of any of the above conditions, and the licensee will be subject to prosecution as though he had never been appointed agent." In accordance with this licence, Mr. Edwards duly received a permit dated May 7, 1900, from the conservators' engineer, specifying the limits within which the work was to be done, and he commenced to dredge shortly afterwards. The sum of 5*s*. was charged for this licence, to cover expenses of printing, &c.

At the trial it was admitted by the plaintiff that the dredging under this licence was for the purposes of the Act, and it was proved that the conservators, in granting licences to various persons to dredge upon the terms that the licensees should be permitted to sell the soil raised by them from the river,

acted in the honest belief that this was the most convenient and economical way of getting the work done.

The question whether the Thames Conservators had exceeded their powers turned upon the construction of several sections in the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.). (1)

(1) The material sections of the Act are as follows :—

"53. The conservators may enter into contracts with any persons for the execution of any works authorized by this Act to be done by the conservators or which they may think proper to do or to direct to be done under the powers of this Act or for furnishing materials or labour or for providing proper engines or other power or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into effect in such manner and upon such terms and for such sums of money and under such stipulations regulations and restrictions as the conservators think proper and every such contract shall be in writing and specify the several works to be done and the materials to be furnished and the prices to be paid for the same and the time or times within which the works are to be completed and the materials to be furnished and the penalties or liquidated damages to be suffered or paid in case of non-performance thereof. . . . ."

"83. The conservators may from time to time do all or any of the things following namely: (1.) For the purpose of maintaining and improving and freeing or keeping free from obstruction the navigation of the Thames—(*a*) dredge, cleanse, and scour the Thames; . . . . (4.) Carry away deposit sell or otherwise dispose of any gravel sand ballast and other substances raised by them under the powers conferred by this section and not required for the purpose for which the same was so raised . . . ."

"87. Any person with and in accordance with the licence of the conservators under the hand of the chairman of the conservators or the secretary may dredge and raise gravel sand ballast and other substances from the bed of the Thames . . . . but subject to the provisions of this Act it shall not be lawful for any person other than the conservators their agents servants and workmen to dredge or raise any gravel sand ballast or other substance from the bed of the Thames . . . . except with and in accordance with such licence (proof of which licence shall lie on the person accused) and if any person acts in contravention of this enactment he shall for every such offence be liable to a penalty not exceeding twenty pounds without prejudice to any other remedy or proceeding against him Provided that nothing in this section shall take away prejudice or affect the rights if any of dredging or raising gravel sand ballast or other substances from the bed of the Thames above the City Stone above Staines Bridge, which would have been vested in or exercisable by the owners of the soil of such bed if this Act had not been passed."

"238. Except as in this Act expressly provided nothing in this Act shall take away alter or abridge any right claim privilege franchise

KEKEWICH J.
1901
PALMER v. THAMES CONSERVATORS.

Warrington, K.C., *Danckwerts, K.C.* (*Stuart Moore* with them), for the plaintiff. The power of the conservators to grant a licence to dredge is contained in s. 87 of the Thames Conservancy Act, 1894, and it is annexed to a penal clause prohibiting dredging without a licence. The section concludes with a proviso saving the right, if any, of private owners to dredge in the upper Thames in the same way as if the Act had not been passed. The Act also contains a general saving of the rights of private owners (s. 238). The effect of that is that the ownership of the soil remains vested in the riparian proprietors unless it is expressly interfered with by the Act.

In order to ascertain the right of a licensee to dredge it is necessary to trace the history of the Thames Conservancy and Navigation Acts. The first Act, the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), relates to the lower Thames only, i.e., the Thames below Staines. Prior to the passing of that Act there was a dispute between the Crown and the City of London, as the conservators of the Thames, as to the ownership of the soil in the lower river, and that dispute was settled as recited in the Act by the Crown conveying its rights in the soil to the City of London (except as to the soil in front of any royal buildings) upon condition that the regulation of the Thames should be under the control of a new body of conservators to be appointed by the Act. In the upper Thames it is admitted that the ownership of the soil is in the riparian proprietors. That Act contained a power to the conservators to dredge (s. 98), but it contained no general power to license others to dredge, nor any power to sell the proceeds of the dredging. The Act also empowered the Trinity House to remove shoals as required by the conservators, and to keep the soil for ballasting vessels (s. 109). They were in fact special licensees of the conservators. The Act also contained a general

---

exemption or immunity to which any owner or occupier of any lands on the banks of the Thames including the banks thereof or of any eyots or islands in the Thames or any person is now by law entitled nor take away or abridge any legal right of ferry but the same shall remain and continue in full force and effect as if this Act had not been passed."

saving clause (s. 179), which has been imported into the Act of 1894, and is s. 238 of that Act.

The next Act was the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), which also dealt only with the lower Thames. That Act for the first time gives to the conservators a general power to grant licences to dredge for ballast (s. 47).

The next Act was the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89). That Act extended the powers of the conservators to the upper Thames (s. 41), but it contained no express provisions as to dredging. The effect of that was that the Thames Conservators had power to dredge in the upper Thames by virtue of the powers contained in the previous Acts, and the riparian owners had by right of such ownership a concurrent right of dredging.

The next Act was the Thames Conservancy Act, 1867 (30 & 31 Vict. c. ci.). Sects. 6 and 7 of that Act related to the upper Thames. Sect. 6 gave the conservators power to—(1.) dredge and remove shoals in the bed of the river; (2.) deepen or otherwise improve the same; (3.) carry away or otherwise dispose of the substances thereby obtained, the proceeds of sale to be carried to the conservancy fund. Sect. 7 contained a prohibition against any person other than the conservators, their agents, and workmen dredging without a licence from the conservators. Therefore, at that time the conservators had power to dredge for the improvement of the navigation and to sell the proceeds, and the riparian owners had also power to dredge, provided they obtained the licence of the conservators; but the owners were entitled to this protection—that the dredging under the powers of s. 6, which was an interference with their rights of ownership in the soil, should be done by the conservators, their agents, servants, or workmen.

The next Act, the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.), has no bearing on this question.

The Act of 1867 was repealed by the Act of 1894, which was a consolidating Act applicable to the whole Thames; but s. 6 was substantially re-enacted in ss. 83 and 84, and s. 7 became the middle clause of s. 87.

Having regard to the whole of s. 87, the only way to construe

KEKEWICH J. 1901 PALMER v. THAMES CONSERVATORS.

the first clause of that section is to treat it as applicable to the lower Thames only, because otherwise that clause does prejudice the rights of the owner contrary to the proviso at the end of the section, which expressly refers to the upper Thames, and to the general saving clause (s. 238). The effect of the section is simply to put the conservators and the riparian owner in the same position as they were under the Act of 1867. This is a reasonable construction of the section, and ought to be preferred to a construction which would involve an unjustifiable interference with the rights of private owners: *Gard* v. *Commissioners of Sewers of the City of London* (1), per Bowen L.J. It is important to the owners that the dredging should be done under the responsibility of the conservators, because otherwise the dredging will not be for the benefit of the navigation, but for what the licensee can get out of it. The conservators are a statutory body and must act strictly within their powers, and they may not dredge for the purpose of selling the proceeds and so increasing their income; they have no power to carry on any general trade of raising and selling gravel: *Goolden* v. *Thames Conservators* (2); *Thames Conservators* v. *Smeed, Dean & Co.* (3), per Chitty L.J. The Act of 1894 does not confer upon them any power to license another person to sell the proceeds of the dredging. Under s. 83, sub-s. 4, the conservators must utilise the proceeds themselves if they can, and they may only sell the surplus; but here the licensee may sell all or any of the proceeds upon any terms he chooses. This licence is in effect a sale by the conservators to Edwards of the plaintiff's soil in situ for 5*s*., Edwards undertaking to do the work of raising the soil. That is not a licence authorized by the Act.

Warmington, K.C., and *Eldon Bankes, K.C.* (*Fitzroy Cowper* with them), for the defendants. The conservators are entitled to dredge the river. This is an act of dredging, and the only question is as to the mode. The conservators remove the soil by the hand of Edwards, who by the terms of the licence is

(1) (1885) 28 Ch. D. 486, 511.
(2) Unreported, before Pollock B. on December 19, 1887; C. A., May 14, 1889; H. L., June 4, 1891.
(3) [1897] 2 Q. B. 334, 350 et seq.

entirely under their control. It is not suggested that more soil has been raised than is required for the improvement of the navigation. Therefore it must be said that an act which would be right if done by the conservators is wrong if done by the licensee. Sect. 53 assists the contention of the defendants, since it enables the conservators to enter into contracts for the execution of works authorized by the Act; and by s. 87 the conservators, "their agents, servants, and workmen," may do this work. Under this dredging licence the licensee is simply the agent or servant of the conservators. There is no magic in the word licence. Even apart from these special powers in the Act of 1894 the conservators could not do the work themselves, but must employ somebody acting under their authority, whether a servant or a contractor: *Hardaker* v. *Idle District Council.* (1) That is the inherent right of every corporation. Then it is said that the licensee cannot sell. The position is the same as if the conservators did the work themselves, and if they did it themselves they might dispose of the proceeds. The words of the Act are, "carry away, deposit, sell, or otherwise dispose of." If the conservators may send a servant to dredge and sell the proceeds for them, why may they not authorize him to dredge and sell the proceeds in lieu of wages? Suppose the money were sent by Edwards to the conservators and then paid by them to him for wages, no objection could be taken to the transaction; but in substance that is what is being done in this case. The whole complaint is that the man who dredges sells the proceeds and pockets the money. Then reliance is placed upon the proviso at the end of s. 87; but that proviso merely preserves the owner's right of dredging subject to the licence of the conservators. If the plaintiff wanted to dredge, and the conservators refused to give him leave and sent their own agent instead, his complaint would be intelligible; but he has made no claim to dredge, and his dredging rights have not been interfered with. The general saving clause will not avail the plaintiff, because no general saving clause will be read as limiting the exercise of powers expressly conferred by the Act

(1) [1896] 1 Q. B. 335, 340.

KEKEWICH J.
1901
PALMER v. THAMES CONSERVATORS.

upon a public body. The same argument was used in *Goolden* v. *Thames Conservators* (1) and was rejected by Pollock B. The granting of licences upon these terms is not an illegal practice, but is a mere carrying out of the provisions of the Act.

KEKEWICH J. The question which I have to decide is a dry question of law. The defendants, the conservators of the river Thames, are authorized to dredge the river for the purpose of maintaining and improving and freeing or keeping free from obstruction the navigation of the Thames; and they are further authorized to sell the proceeds of that dredging as they think fit—that is to say, so much as they do not require for the other purposes of the Act—carrying the money to the credit of the conservancy account. Can they give authority to another person, not only to dredge, but also to sell the proceeds of the dredging for his own benefit?

Now, there are two things, as it seems to me, which must be borne in mind and kept before one in considering this question. The first is that these conservators are the creatures of statute. We know, by the historical narrative in the Act of 1857 to which my attention has been called, that there were conservators before the present body. It seems that the corporation of London were by some title, it matters not what, conservators of the river Thames; but the present conservators —the corporation with which we are now dealing—are creatures of statute. They have the powers which the statute has conferred on them, with, of course, such powers as a corporation has at common law. They have no powers whatever beyond that. If you fail to find within the four corners of the statute, either in express words or by necessary implication, that they have the power which is claimed in this action, the Court must hold that they have not got it, unless, indeed, as I have said, it is one of those things which is inherent in the very existence of a corporation and belongs to them at common law. The second point is that, in the part of the Thames with which we are now concerned—the upper part of the Thames—

(1) Unreported, before Pollock B. on December 19, 1887; C. A., May 14, 1889; H. L., June 4, 1891.

the soil of the river is in the riparian proprietors. It belongs to them and not to the conservators, and, so far as the ownership of the soil is not interfered with by the statutory powers of the conservators, they are to all intents and purposes owners of the soil as much as they are owners of the meadows on either side of the river. To my mind these two things give the real guide to the construction of the statute, and without that guide it is impossible to construe the statute.

It is admitted that what the defendants have done and are intending to do is for the purpose of maintaining and improving and freeing or keeping free from obstruction the navigation of the Thames, using the words of the 1st subsection of the 83rd section of the Act of 1894. And, although the plaintiff was not willing to admit it, it has been proved that the conservators in acting as they have done have acted in a way which they honestly believed to be the most convenient and economical exercise of their powers. They believed that it was to the advantage of the public and, it was said, though this is mere argument, to the advantage of the riparian proprietors themselves, that the dredging should be done in this way. Still, if it is not within their statutory powers they cannot do it; and if by an act which is not an exercise of their statutory powers they are interfering with the ownership of the soil, then the plaintiff as the owner of the soil has a right of action, and is entitled to succeed.

The position of the defendants, of course, depends upon the Act of Parliament. In the first place, I say that, as at present advised—and I have not considered the matter so carefully as I otherwise should have done, because I do not think it becomes material from my point of view—the saving provisoes of the Act of 1894 do not affect the question at all. The proviso at the end of s. 87 is only to this effect—that nothing in this section shall take away, prejudice, or affect the rights, if any, of dredging or raising gravel, sand, ballast, or other substances from the bed of the Thames above the City Stone above Staines Bridge which would have been vested in or exercisable by the owners of the soil of such bed if this Act had not been passed. We know that the power of the riparian

KEKEWICH J. 1901 PALMER v. THAMES CONSERVATORS.

owners to dredge is limited by the Act of Parliament, which made it impossible for them to do so without the licence of the conservators. Their right, subject to that licence, is reserved. That is the whole effect, as it seems to me, of that proviso, and I do not see that it has any close bearing on the question in hand. The general saving clause, which is s. 238, also seems to me to have little, if anything, to do with this question. It is, as expressed in the marginal note, a general saving of rights: "Except as in this Act expressly provided, nothing in this Act shall take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owner or occupier of any lands," and so on, would be entitled "if this Act had not been passed." That does not seem to be language in which the Legislature would ordinarily deal with the ownership of the soil. But the truth is, no saving clause as regards that was necessary. The ownership of the soil remains with every right that attaches to ownership. As I have said, it is an ordinary canon of construction that the ownership of the soil is not interfered with by Act of Parliament except so far as it is done expressly or by necessary implication. Therefore I put aside these two saving clauses, on which some argument turned, and, nevertheless, I find the plaintiff still remaining owner of the soil and entitled to say to the defendants, "You must prove against me by force of the statute that you are entitled to do what you claim."

Now, the power on which the conservators depend is in the 83rd section. By the 1st sub-section the conservators may, for the purpose of maintaining and improving the navigation, dredge, cleanse, and scour the Thames. Then, in addition to that, they may by sub-s. 4 sell what is taken from the river by way of dredging, so far as they do not require it for their own purposes. That power was given in the first instance by s. 6 of the Act of 1867, which provided that the money should be paid to the conservancy fund. There is no such provision in this particular section, but it follows as a matter of course. The conservators receive the money in their character of conservators, and of course they must keep an account of it as part of the conservancy fund. It belongs to them to be disposed of

in such way as the Legislature has directed. It does not belong to them individually, but it belongs to them as a corporation. Therein, as it seems to me, lies the distinction between what they are proposing to do and what they are authorized to do by the Act. The Act allows them to dispose of the material and to receive the money for the purposes which I have stated. But the Act does not in express terms allow others to dredge and sell and receive the money, not for the conservators or for conservancy purposes, but for their own profit. There are no words in the Act which expressly authorize that; but it is said that the Act cannot be properly construed except in that way. Mr. Warmington argued the point rather on the words of the Act; Mr. Eldon Bankes argued it rather on the general law. It was the same argument from two points of view: Mr. Warmington put it on ss. 53 and 87; Mr. Eldon Bankes on the common law powers and privileges of a corporation. Sect. 53 expressly allows the corporation to enter into contracts with any person for the execution of any works authorized by the Act. Mr. Edwards has not a contract with the corporation for the execution of any works at all. He has a licence or authority (I do not think anything turns on the word "licence") to execute the work of dredging, but there is no contract by him with the corporation, and what is pointed to here obviously, without reading the section at length, is that the conservators may from time to time look forward and anticipate what is to be done and make arrangements for that purpose, and not only make arrangements, but reduce those arrangements to a definite form and put other persons under certain obligations, and in fact deal with the matter as if they were ordinary persons and not a corporation. I do not think there is anything in that section at all that contemplates such a dealing with Mr. Edwards, or other licensees in his position, as we have here.

Then we pass to s. 87. That section presents a difficulty, because it does refer to the work being done by the "conservators, their agents, servants, and workmen." I doubt whether the Legislature had in contemplation that the conservators

KEKEWICH J.

1901

PALMER v. THAMES CONSERVATORS.

might do the work by means of a licence such as we have here—that is to say, something different from the employment of workmen to do work on their behalf. Of course, as has been pointed out, the conservators cannot do it themselves. They can only do it by their agents, servants, or workmen, and of course that is recognised by the statute. This section says: "It shall not be lawful for any person other than the conservators, their agents, servants, and workmen to dredge." Therefore, the only persons who are allowed to dredge from the time of the passing of this Act are the conservators, through their agents, servants, and workmen. But they must produce for that purpose a licence—that is to say, there must be something to shew that he who is acting as agent of the corporation has authority for that purpose. He must have a licence and must be able to produce it, and he must act according to the terms of the licence and not in contravention of it, under a penalty which is mentioned in the statute. That no doubt includes the proprietors of the soil who, as I have already mentioned, are prohibited from dredging except by a licence. But it would be straining the language of the section a great deal too far to say that therefore the corporation is able to delegate its authority to somebody else, I will not say without control, because that would not be accurate, but to act on his own account and on his own behalf, and not only interfere with the soil of the riparian proprietors, but, when he has taken the soil, take it away and sell it for his own profit. I see nothing there pointing to a licence of that kind. But then the argument on behalf of the conservators takes this form, and it deserves attention: "After all you call this a licence, but there is nothing in the word 'licence.'" I assent to that. "What we are really doing is only to employ an agent. We give Edwards this licence in writing, but it is accompanied by restrictions which make him for this purpose our agent. He cannot touch any part of the river until it has been pointed out to him by a proper officer, and been described in the permit. Then, he is only to work it under the directions of the officer of the corporation, and when he has removed enough he can sell it;

but if he should remove more the licence would be stopped. If he offends in any way his licence can be revoked, and he is under certain penalties; and the result of that really is that this is merely a special mode of employment, and he is our agent, servant, or workman within the meaning of the Act as much as if he were paid a weekly or other wage by the engineer, or other officer of the corporation." To my mind the distinction is this. That is not the privilege which is granted. It is true his employment is fettered in the way I have mentioned, and that he bears a close resemblance to an ordinary agent of the conservators. But he has this further privilege: that the soil which he takes out of the river belongs to him from the moment it is in his punt. The conservators do not claim on the face of the licence any right or title to it. It is his to sell as he pleases. There is no question whether it is wanted for any other purposes. He is allowed by the terms of his licence to sell it for his own profit. In other words, he is allowed to take the soil out of the bed of the river belonging to the riparian proprietor and appropriate it for himself. That, to my mind, raises the whole difficulty, and it is the gist of the complaint against the conservators. Now, Mr. Eldon Bankes argued strenuously that after all there is no harm done, and that it matters not whether you credit a man with 10*s*. for his labour and set off against that 10*s*. worth of soil which he can sell and cry quits, or whether you pay 10*s*. for his labour and appropriate the 10*s*. for the soil you sell yourself, and put it to your credit in the account. I agree. It would work out precisely in the same way. There may be no hardship to the riparian proprietor. It may be that this is a very convenient way of carrying on this dredging. It may save a good deal of complication, and may save the necessity of buying more plant and so forth. But that is not the question I have to consider. The question I have to consider is, not whether what is being done might not have been conveniently provided for by the Act, but whether it is provided for by the Act. If it is not in the Act, I repeat, by express words or by necessary implication, then clearly the plaintiff has a right of action, and is entitled to stop the defendants from doing that which the statute has not

KEKEWICH J. 1901 PALMER v. THAMES CONSERVATORS.

authorized them to do. On the construction I put on this statute the conservators have exceeded their powers. There must be a declaration that the dredging by the defendant Edwards, under the licence of the conservators dated January 11, 1900, was not authorized by the Act of 1894 and was a trespass. There will be liberty to the plaintiff to apply for an injunction, and he must have the costs of the action.

Solicitors: *Dale, Newman & Hood; James Hughes.*

H. B. H.

KEKEWICH J. 1901 *Dec.* 5, 6.

In re TIMMIS. NIXON *v.* SMITH.

[1900 T. 1440.]

Trustee—Breach of Trust—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—"*Action to which no existing Statute of Limitations applies*"—*Property* "*received by Trustee and converted to his use*"—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Executor when becoming Trustee.*

A testator bequeathed his personal estate to three trustees and executors upon trust for conversion and investment to provide an annuity to be paid to his wife during her life, and to divide the residue, and also the annuity fund at his wife's decease, into four shares, one of which was settled on a niece of the testator for life with remainder to her children, and the other three were divisible between the three executors equally. After the death of the widow the executors and trustees divided the fund set apart to answer the annuity, and instead of retaining the settled share, paid it away to the tenant for life. More than six years, and less than twelve years, after the death of the tenant for life, one of her children brought an action against the representatives of the three executors and trustees for an account of the settled share, and payment of what should be found due to the plaintiff:—

Held, that it must be assumed that the executors and trustees of the will acted duly in the administration of the estate, and became trustees of the fund upon the express trusts declared by the will, and that the action was not an action for a legacy within the Real Property Limitation Act, 1874, but was brought against the defendants in the character of trustees and not of executors, and was "one to which no existing Statute of Limitations" applied within the Trustee Act, 1888, s. 8, sub-s. 1 (*b*):

Held, also, that as each of the executors and trustees received only the share which was payable to him by the terms of the will, it could not be held that a part of the settled share was received by him and "converted

to his use" within the meaning of the exception contained in the earlier part of sub-s. 1 of s. 8 of the Act of 1888:

Held, therefore, that the action was barred under s. 8 of the Act of 1888 by the lapse of six years from the time when the right of action accrued.

PETER TIMMIS by his will dated December 6, 1856, devised all his lands and hereditaments to his nephews William Smith and Peter Smith as tenants in common charged with the payment of 400*l.* which he directed should be settled on his niece Ann, the wife of William Pointon, and her children in like manner as her share in his residuary personal estate, and the testator gave and bequeathed all his personal estate and effects to the said William Smith and Peter Smith upon trust that they or the survivor of them or the executors or administrators of such survivor should sell and convert into money such part thereof as should not consist of money, and should stand possessed thereof and of all moneys produced therefrom upon trust to invest upon Government stocks or funds or good or leasehold securities a sufficient portion thereof to produce an annuity of 120*l.*, which he directed should be paid to his wife Mary during her life, and as to the remainder of the said moneys upon trust to pay one equal fourth part thereof to William Smith, and as to one other equal fourth part thereof to invest the same and to stand possessed thereof upon trust during the life of Ann Pointon to pay the annual produce thereof to her, and after her decease in trust for all and every the children and child of Ann Pointon who being a son or sons should respectively attain the age of twenty-one years, or being a daughter or daughters should respectively attain that age or marry, to be divided between them if more than one in equal shares, and as to one other equal fourth part thereof upon trust to pay the same to Peter Smith, and as to the remaining fourth part upon trusts in favour of Mary Smith and her children, if any, similar to those declared in favour of Ann Pointon and her children, an absolute power of appointment by deed or will in default of children being given to Mary Smith. The testator then directed that after the decease of his wife his said trustees should divide the money and securities

KEKEWICH J.
1901
TIMMIS, *In re.* NIXON *v.* SMITH.

set apart to produce her annuity equally between William Smith, Ann Pointon, Peter Smith, and Mary Smith, the shares of Ann Pointon and Mary Smith to be held in trust for them, their children or appointees, in like manner as was thereinbefore directed with respect to their other shares and portions under his will. And the testator appointed William Smith and Peter Smith to be the executors of his will.

By a codicil to, and bearing even date with, his will, the testator appointed Mary Smith to be a trustee and executrix of his will in conjunction with William Smith and Peter Smith, and gave, devised, and bequeathed the trust estates to them accordingly.

The testator died on September 9, 1857, and his will and codicil were proved by William Smith, Peter Smith, and Mary Smith. The personal estate of the testator at the time of his death was of the value of 5000*l.* or thereabouts.

Mary Timmis, the widow of the testator, died on February 18, 1873.

William Smith died on July 25, 1891, and the defendants Elizabeth Smith, William George Smith, Mary Jane Hill, and Elizabeth Timmis Yates were his executors and trustees.

Ann Pointon died on November 18, 1892, having had eight children, of whom the plaintiff Alice Nixon was one.

On the death of Ann Pointon the defendant W. G. Smith, who appeared to be the acting trustee in the matter, paid to each of the children of Ann Pointon his or her share of the sum of 400*l.* charged on the lands and hereditaments of the testator Peter Timmis as above mentioned, but alleged that the one-fourth share of the testator's residuary personal estate bequeathed in favour of Ann Pointon had been fully accounted for to her. No payment was made to the plaintiff in respect of her share in such one-fourth, but she was induced on insufficient advice to execute a release in respect thereof.

Mary Smith died a spinster on March 4, 1893, and the defendant W. G. Smith was the executor of her will.

Peter Smith died on February 4, 1899, and the defendant Mary Smith the younger was the executrix of his will.

The plaintiff brought this action against the five defendants

above named, the representatives of the three executors and trustees of the will of Peter Timmis, claiming, inter alia, (1.) that, notwithstanding the release above referred to, an account might be taken of the personal estate not specifically bequeathed of the testator and of the one-fourth part thereof bequeathed in trust for Ann Pointon and her children which came to the hands of William Smith, Peter Smith, and Mary Smith respectively, deceased, the executors of his will or any of them, or had come to the hands of the defendants or any of them, or to the hands of any other person or persons by the order or for the use of William Smith, Peter Smith, and Mary Smith respectively, deceased, and the defendants or any of them; (2.) payment by the defendants to the plaintiff of what should appear to be due on taking such account; and (3.) if and so far as might be necessary, administration of the personal estate of the testator.

The defendants amongst other defences relied upon the Trustee Act, 1888, s. 8, as a bar to the action.

From the evidence given at the hearing of the action it appeared that a fund was set apart by the executors and trustees of the will to provide for the annuity of 120*l.*, and that on the death of the widow in 1873 they realized this fund, and from time to time paid sums of equal amount to each of themselves and to Ann Pointon, thus treating Ann Pointon as being absolutely entitled, instead of setting apart the one-fourth share of which she was tenant for life to be invested and applied according to the trusts of the will.

It was considered by his Lordship to be reasonably clear upon the evidence that the whole of the fund set apart to answer the annuity was distributed in this way, the last payment being made in March, 1880. It did not appear whether there was any other personal estate of the testator which was similarly dealt with, but the evidence rather tended to shew that the investment made to answer the annuity exhausted the whole, or very nearly the whole, of the testator's residuary personal estate.

Renshaw, K.C., *Whitaker*, and *Talbot K. Crossfield*, for the

KEKEWICH J.

1901

TIMMIS. *In re.* NIXON *v.* SMITH.

plaintiff. The Trustee Act, 1888, s. 8, sub-s. 1, clause (*b*), affords no defence to this action. That sub-section is confined to a case to which no existing Statute of Limitation applies; but at the passing of the Trustee Act, 1888, the statute applicable to this action was the Real Property Limitation Act, 1874. Sect. 8 of that Act provides that no action shall be brought to recover any legacy but within twelve years after the present right to receive the same shall have accrued. That was a re-enactment of s. 40 of the Real Property Limitation Act, 1833, except that the period of twelve years was substituted for the period of twenty years limited by the Act of 1833. Under that Act it has been held that the word "legacy" includes a share of residue: *Prior* v. *Horniblow* (1); *Christian* v. *Devereux*. (2)

This is an action to recover a legacy, and, there being a Statute of Limitations which applies, the Trustee Act, 1888, s. 8, has no application; and the action is not barred, because the twelve years limited by the statute of 1874 have not run. *In re Swain* (3) may be relied on by the defendants, but that case is distinguishable. Romer J. put the very point in his judgment. He said: "The short point which I have to decide in the case before me is, really, whether this is an action for a legacy, or for relief in respect of a breach of trust," and, because he came to the conclusion that it was an action for a breach of trust, he held that no existing statute was applicable, and that therefore the case was governed by s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888. If the action had been to recover a legacy, his decision would have been the other way.

Warrington, K.C., and *Leuchars*, for the defendants. This action is not one which could have been brought at law against executors to recover a legacy. It is an action against trustees of a fund held on express trusts. Under the Trustee Act, 1888, s. 8, sub-s. 1 (*b*), the test is whether a plea of the statute would have availed the defendants previously to that Act. It is submitted that it would not. The nature of the action must be determined at the time when the action is brought, and the

(1) (1836) 2 Y. & C. Ex. 200; 47 R. R. 399.

(2) (1841) 12 Sim. 264.

(3) [1891] 3 Ch. 233, 240.

inference from the evidence is that at that time the executors had long since ceased to be acting merely as executors, and had assumed the character of trustees, holding upon the express trusts declared by the will. If the executor had been a different person from the trustees, his duty would have been confined to paying the debts and funeral and testamentary expenses, and he would then have handed over the residue to the trustees, who would have held upon the trusts of the will. The fact that the trustees are also executors can make no difference, for they could not plead their own failure of duty so as to avail themselves of the statute. The present action, therefore, is, within the meaning of s. 8, sub-s. 1, clause (*b*), of the Trustee Act, 1888, "one to which no existing Statute of Limitations applies," and accordingly that enactment applies, and the action is barred by the lapse of more than six years from November 18, 1892, when the right of action accrued. The authorities support this view. In the case of *In re Davis* (1) there was a direct gift of residue without the interposition of trustees, and the Court held that the statute of 1874 applied, notwithstanding the existence of a mere constructive or implied trust; but it is plain from the reasoning that the conclusion would have been directly the reverse if there had been an express trust, as there is here. In *In re Page* (2) the facts were similar to those of the present case, and it was held that s. 8 of the Trustee Act, 1888, was a bar to an action by a cestui que trust brought more than six years after he attained twenty-one, in respect of a fund which had in fact been applied by the trustee in maintaining him. *In re Swain* (3), cited against us, for the purpose of distinguishing it, is a clear authority in our favour. It shews that to an action for a breach of trust of this kind the statute of 1874 is not applicable, and therefore the statute of 1888 is.

Renshaw, K.C., in reply. The defendants have failed to shew that the executorship ever merged in the trust. The true inference from the evidence is that the executors acted as such throughout.

(1) [1891] 3 Ch. 119. (2) [1893] 1 Ch. 304.
(3) [1891] 3 Ch. 233.

KEKEWICH J.
1901
TIMMIS, *In re.*
NIXON *v.* SMITH.

But further, it is contended that, as to three-fourths of the one-fourth share, s. 8 of the Trustee Act, 1888, will not protect them, because the action is within the exception at the beginning of sub-s. 1, as being a claim to "recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use." Each of the trustees, when there was a division made, received a proportion, namely, one-fourth, in excess of what he ought to have received, and that one-fourth was part of the settled share. When they paid themselves the whole they were really, as to one-fourth, taking part of my share.

Warrington, K.C., in reply, on the new point raised. The plaintiff's money was paid away, not "retained" or "received and converted." Each trustee only received his own share. The word "retained" is to be construed literally, and not so as to include a mere notional retainer.

KEKEWICH J. There are few things more difficult than to determine when an executor ceases to have duties quâ executor or virtute officii, or, as it is phrased in the Finance Act, "as such." There are few wills which come before the Court which do not contain directions to persons as executors and as trustees, and it is a common case that the same persons are executors and trustees. The difficulty sometimes occurs in this way. One of the duties of an executor is to pay debts; a debt of importance may be disputed, it may be the subject of a prolonged litigation, and in the meantime the executor may be retaining the whole estate, partly to pay the debt and partly to indemnify himself. During that interval is he executor, or is he trustee? A similar difficulty arises where there is a claim of the Crown for duty; and the matter might be illustrated in several other ways. Suffice it to say that it is extremely difficult to draw the line, even when the facts are fully ascertained.

This will presents a case of an ordinary type. [His Lordship stated the effect of the will and codicil, and continued:—] We have, therefore, the ordinary case, where the same persons are appointed executors and trustees, and some time or other

cease to be executors and become trustees. Of course, in the strict sense of the word they never cease to be executors. Having accepted probate, they are, during the rest of their lives, the legal representatives of the testator; but after a certain time they have no duties as executors to perform, and can no longer be said to be doing anything virtute officii. Under a will framed as this will is, the ordinary duty of an executor is to pay the debts, funeral and testamentary expenses, and when that is done (inasmuch as there are no legacies in the ordinary sense) he has done all that is necessary, and though he still remains executor he has done his duty and is functus officio. [His Lordship then referred to the facts of the case as above set out, and continued:—] Now how, upon this imperfect evidence, am I to solve the difficult question whether these executors were trustees or not? The testator died in 1857. There was no apparent obstacle to winding up the estate in a reasonable time; and I must assume that these executors did their duty, and that long before 1892, and probably before the death of the widow, they had ceased to be executors in the sense of having anything to do, and the fund was held by them as trustees. That, of course, would not free them from any claim for duty. They remained executors and might be sued as such. I think I must assume that in distributing the investments they acted under the express trusts of the will. That being so, can I now say that they are responsible to the plaintiff for her share of the one-fourth which ought to have gone to Ann Pointon for life? Admittedly it is not forthcoming. The whole was paid away to Ann Pointon, and that, of course, was a breach of trust for which the trustees became responsible out of their own moneys. For the present purpose I need not consider what became of the money, but I am bound to consider whether the trustees have made a fraudulent appropriation, or done anything which the Court would regard as fraud, or have converted money to their own use. Of anything of that kind there is not only no evidence, but no suggestion. The money has been spent. It has been paid away to persons other than the cestuis que trust, the children of Ann Pointon. The plaintiff is one of the children, and the action by her is

KEKEWICH J.
1901
TIMMIS, *In re.* NIXON *v.* SMITH.

for an account of the personal estate of the testator so far as this particular one-fourth share is concerned. The object of an action for an account is to recover the money. It is therefore clearly an action coming within clause (*b*) of sub-s. 1 of the Trustee Act, 1888, s. 8.

Then it is said by the defendants that the Statute of Limitations imported into s. 8 of the Act of 1888 by reference is a bar to the action. There was difficulty in ascertaining the effect of that reference, but it is now established that, shortly stated, the meaning of the statute is that when six years have elapsed since the right of action accrued then the defendants are entitled to plead the statute, and the plaintiff cannot succeed. Here the right of action accrued on November 18, 1892, when Ann Pointon died, and the writ was not issued until September 3, 1900, so that the time has been exceeded, and the action is barred by the Act of 1888 if that statute is applicable. The answer is that the statute of 1888 is remedial, and intended to fill a gap; not to enact generally that a trustee may plead the statute, but only that he may do so where previously it was impossible to plead it. Clause (*b*) states that in plain language. It is to apply only if the action "is one to which no existing Statute of Limitations applies." If an existing Statute of Limitations applies, then the Act of 1888 does not apply. If any other statute applies, it must necessarily be the Real Property Limitation Act, 1874, which gives the plaintiff twelve years, and, the action having been brought within twelve years, she is entitled to succeed. The question, therefore, is whether the Act of 1874 applies or not. That seems to me to depend entirely on the question whether the defendants are to be regarded as executors or as trustees. If they are executors, they are sued for a legacy, a share of residue, and then the Act of 1874 applies. If they are sued, not as executors, but as trustees, then in order that the plaintiff may recover money from them, the statute of 1874 is inapplicable, and, there being no other Statute of Limitations applicable, the statute of 1888 comes in, and the plaintiff's action is barred. The cases of *In re Davis* (1), *In re Swain* (2), and *In re Page* (3)

(1) [1891] 3 Ch. 119. (2) [1891] 3 Ch. 233. (3) [1893] 1 Ch. 304.

have been cited, but I need not refer to them particularly, because they all proceed on the same lines, namely, that if once you can find that defendants are sued as trustees of a fund, and not as executors, then, as before the Act of 1888 there was no Statute of Limitations applicable to them, the Act of 1888 is applicable. For the reasons I have given, and on the assumption which I have made, and which is required because otherwise I have no evidence sufficient to enable me to define the point of time at which the executors became trustees, I think that the defendants in this case are sued as the representatives of trustees, and are entitled to the benefit of the statute. But then Mr. Renshaw argues that the case is to a certain extent not within s. 8 of the Act of 1888, because it falls within the exception contained in the beginning of the section as being an action brought to recover property or the proceeds thereof "still retained by the trustee, or previously received by him and converted to his use." As I pointed out in the argument, the Legislature has carefully used the word "retained" as meaning what it says, namely, money which is not merely in the eye of the law in the hands of the trustee, because he has never paid it away to a person entitled to give a discharge, but money which is really in his pocket in the sense that it is invested in his name, or in land belonging to him, or in the name of some other person as trustee for him. In order to say that it is "retained," you must be able to put your finger on the property or the proceeds and say that it is still under the control of the trustees. There is no suggestion that that can be done here, but it is said that the case can be brought within the succeeding words. It is said that each of the three trustees must be taken to have received one-fourth of the share belonging to the children of Ann Pointon, and to have converted such fourth to his use. I pointed out to Mr. Renshaw that in that point of view, if entitled to succeed, he is entitled to go against each trustee in respect of a fourth, and not against three trustees in respect of three-fourths, because the statute points only to the personal use by a trustee, and does not speak of the payment by one trustee to another, which, after all, is only a breach of trust just as much

KEKEWICH J.
1901
TIMMIS, *In re.* NIXON *v.* SMITH.

as a payment to a stranger who is not a trustee. Then Mr. Renshaw says Peter Smith (to take his case) has received and converted to his use one-fourth of this share, and therefore the case is taken out of the statute, and of course the plaintiff is entitled to an account of that. The answer to that is, that Peter Smith was himself entitled to a one-fourth share; that this is not the case of a trustee putting into his own pocket what belongs to a cestui que trust so as to defraud the cestui que trust, but he only appropriated to himself that which the will gave him. I think that answer is complete. The point is a new one, and at first I felt some difficulty about it, but I think that when one looks at the statute there can be no doubt what was meant. The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, i.e., money of the trust received by him and converted to his own use. That seems to me the proper construction of the words, and I think the context confirms that view. Here Peter Smith (and so with the others) only received that to which he was entitled. They ought to have put one-fourth of the fund apart. Whether they did that or not could not in the least interfere with their right to receive their own shares; and it would be extremely hard to say that, having paid themselves what they were entitled to, they were not to have the advantage of the statute as to that which ought to have been paid to a cestui que trust.

The action fails and must be dismissed, but without costs.

Solicitors: *Stephens & Stephens, for Sheldon, Plant & Barclay, Congleton; G. F. Hudson, Matthews & Co., for Henry Lister Reade, Congleton.*

C. C. M. D.

In re COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL.

BYRNE J.
1901
Nov. 27.

Vendor and Purchaser—Will—Special Executors—General Executors—Sale by General Executors—Concurrence of Special Executors—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2 *sub-s.* 2; 24 *sub-s.* 2.

Where by his will a testator appoints special executors as to property situate in a foreign country or in the Colonies, and by the same will appoints other persons general executors of his will, on a sale by the general executors of the testator's real estate in England a good title can be shewn thereto without the concurrence of the special executors.

By his will dated July 11, 1900, Abraham Cohen, of Sydney, New South Wales, but then residing in London, appointed David Nathan and E. L. Samuel executors of his will as to property and premises thereinbefore given to them (which property and premises were in Australia) and S. B. Cohen, N. M. Cohen, and L. H. Nathan general executors of his will.

The will was duly proved by the general executors in July, 1901.

By a contract in writing dated July 8, 1901, and made between the general executors of the above will by their agent of the one part and the London County Council by their agent of the other part, the executors contracted to sell to the council the fee simple of certain premises at Hackney forming part of the estate of the testator.

On the investigation of the title a question arose whether the testator's real estate in England vested, under s. 1 of the Land Transfer Act, 1897, in the general executors of the will alone, or in those persons and the persons appointed special executors as to the Australian property jointly.

The county council contended that under the above section of the Act and s. 2, sub-s. 2, a good title could not be made without the concurrence of the special executors; while, on the other hand, the general executors contended that they alone were the personal representatives of the testator upon whom the testator's real estate in England devolved, and that they

BYRNE J. 1901 COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL, *In re.*

could make a good title without the concurrence of the special executors.

This was a summons taken out by the purchasers for the determination of the question.

Frederic Thompson, in support of the summons.
Vaughan Hawkins, for the vendors.

[The following cases were cited or referred to: *In re Parker's Trusts* (1); *In re Pawley and London and Provincial Bank* (2); *In the Goods of Coode* (3); *In the Goods of Harris* (4); *In the Goods of Murray* (5); *Rose* v. *Bartlett.* (6)]

BYRNE J. In this case a question is raised as to the proper construction to be put upon specific sections of the Land Transfer Act, 1897. The circumstances are shortly as follows: [His Lordship stated the facts.]

It is clear that the Australian executors are not entitled to property in this country. Moreover, it is competent for a testator to appoint executors for different portions of his property. He may appoint executors for properties situate in different counties in England. He may appoint executors of various portions of his assets in different parts of the world. That, I think, is clearly established by the authorities that have been cited to me. The testator here did, therefore, that which was lawful. He appointed Australian executors in respect of his Australian assets, and he appointed general executors in respect of his assets in England, who would be entitled to his property here.

But it is said that, reading the provisions of the Land Transfer Act, 1897, together with the preamble, the Act must be read as if it had the operation of vesting the real estate situate in England in the English executors and the Colonial executors jointly, and, therefore, that a good title cannot be made unless they all join.

(1) [1894] 1 Ch. 707.
(2) [1900] 1 Ch. 58.
(3) (1867) L. R. 1 P. & M. 449.
(4) (1870) L. R. 2 P. & M. 83.
(5) [1896] P. 65.
(6) (1631) Cro. Car. 292.

The preamble of the Act says, "whereas it is expedient to establish a real representative, and to amend the Land Transfer Act, 1875"; and the 1st section provides that "where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him"; and s. 24, sub-s. 2, enacts that "in this Act the expression 'personal representative' means an executor or administrator"; so that, taking these words and putting them into the 1st section, then that section reads, "shall devolve to and be vested in his executors or administrators." Then s. 2, sub-s. 2, provides that "all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

Now, the real point is whether the words "become vested in his personal representatives or representative from time to time" are so large as to force me to hold that the testator's real estate in England vests in persons named as foreign executors in respect of foreign assets jointly with those named in respect of assets in England.

First of all, what is the meaning of "real representative" in the preamble, and what is the object of the 1st section? It clearly is that there shall be in respect of lands coming within the purview of the Act a representative of the deceased who shall have, with the slight exception referred to in the section, the same powers in respect of real estate as he has already in

BYRNE J. 1901 COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL, *In re.*

respect of personal estate. I say "as he has" because the true object of the Act is to appoint those persons already having or entitled to have control over personal estate to have and be entitled to have control over the real estate. I think it is not an unfair test to apply, in order to discover the true meaning of this 1st section, to ask oneself what chattels real have vested in the Colonial executors jointly with the English executors. The answer to that question is clearly, none. Would it not be going against the true meaning of the section to hold that real estate was to vest in persons not entitled to probate in England and not entitled to chattels real? I think it would. I think that when the section uses the expression "personal representatives or representative from time to time as if it were a chattel real vesting in them or him," those words mean those persons in whom as personal representatives or representative chattels real (if the testator has any) vest.

I think, therefore, that a good title can be shewn without joining the Colonial executors.

Solicitors: *W. A. Blaxland; Edwards & Cohen.*

G. M.

Applied. PHILLIPS *v.* LAMDIN.
[1949] 1 All E.R. 770.

JONES *v.* GARDINER.

BYRNE J.

1901

Nov. 28; *Dec.* 2.

[1901 J. 377.]

Vendor and Purchaser—Conditions of Sale—Delay—Interest—Damages—Loss of Expected Profits.

A purchaser cannot be compelled to pay interest for delay under a condition that "the purchaser in default" shall pay interest on the remainder of his purchase-money, where the delay has been occasioned by the default of the vendor.

Damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract.

ACTION.

The plaintiffs by their writ in this action claimed specific performance of an agreement of September 21, 1900, for the sale by the defendant to them for 620*l.* of two plots of freehold land at Peppard Common, in the county of Oxford; but the only questions argued at the trial of the action were whether, under the circumstances hereinafter stated, the plaintiffs were entitled to any damages for the delay which had taken place in the completion of the purchase, and whether the vendor could recover interest for delay under the conditions of sale.

The property was described as lots 22 and 23 in certain printed particulars and conditions of sale which had been prepared for a sale by public auction. Both were sold as with possession, and were described as being delightfully situated for the erection of country houses. The time fixed for completion by the agreement of September 21 was October 22, 1900; a deposit of 50*l.* had been paid on signing the contract. Condition 3 of the printed conditions of sale, which were embodied in this contract, after referring to the completion of the purchase, provided that, if from any cause whatever the completion of the purchase was delayed beyond the date mentioned, "the purchaser in default" should pay interest on

BYRNE J. 1901 JONES v. GARDINER.

the remainder of his purchase-money at the rate therein specified until completion.

On October 1 an incomplete abstract was delivered, upon which requisitions were made and answered. On October 16 notice was given to the vendor that the purchase-money was ready and lying idle. On November 3 a further abstract was delivered, upon which further requisitions were made, which were answered on November 10. A long correspondence passed between the solicitors of the parties as to the release of a certain equitable charge for 1600*l.* on the property in the contract with other property of the vendors, in favour of one W. Eichholtz, which caused further delay. On November 26 a draft of the proposed conveyance was sent to the vendors for approval, and further negotiations and correspondence took place as to the form of the conveyance, and the form was not agreed to till February 1, 1901. On February 19 an action for specific performance was threatened, but proceedings were delayed by promises by the vendor that the purchase should be at once completed. On March 6 the writ in this action was issued. On March 18 the release of Eichholtz's equitable charge was obtained. On March 25, on a summons for directions being heard, the sale was ordered to be completed on April 1, without prejudice to the question of damages and costs. On April 1, 1901, the purchase was completed, the plaintiffs paying the balance of the purchase-money to the defendant, and 10*l.* 3*s.* 4*d.* in addition for interest claimed under condition 3; but this latter payment was made under protest and without prejudice to the rights of the plaintiffs, as purchasers.

The property, according to the plaintiffs, had been purchased with a view to altering the farmhouse and buildings on lot 22 into a modern and habitable dwelling-house, to be let in the following spring or summer, and converting certain iron buildings on lot 23 into a bungalow, suitable for persons desirous of coming into the neighbourhood for boating. The plaintiffs alleged that, owing to the delay of the vendor in completing his contract, they had been unable to make the necessary alterations on lot 22, or to fit up a bungalow on lot 23, so as to be able to let them at Lady Day or Midsummer, and, conse-

quently, that a year's rent of their property had thus been lost, as dwelling-houses of the above description could, as they alleged, only be let during the early part of the summer season, when there was a great demand for property of this kind, and practically no demand at any other period of the year. The plaintiffs accordingly claimed, amongst other things, damages for loss of rent, 25*l.* for the farmhouse, and 40*l.* for the bungalow. There were other items of alleged damage which were not pressed at the trial.

Eustace Smith, for the plaintiffs. The Court has jurisdiction to give damages for delay in a case of this kind, where the delay is entirely owing to the default of the vendor: *Jaques* v. *Miller* (1); *Royal Bristol Permanent Building Society* v. *Bomash* (2), in both of which damages, in the nature of compensation, for loss of expected profits and loss of a tenant were given. The property was purchased for the express purpose of erecting dwelling-houses to be let in the ensuing summer, and the printed particulars offered the purchasers possession. The defendant was not entitled to interest on the balance of the purchase-money, when the delay was caused by his default.

Lyttelton Chubb, for the defendant, the vendor. The vendor has acted in good faith in this case; the delay was caused by difficulties in getting a release from the equitable charge, and there were difficulties in the form of the conveyance; the plaintiffs, therefore, are not entitled to damages for loss of bargain: *Bain* v. *Fothergill*. (3) The defendant is entitled to interest, under condition 3, from the date fixed by the contract for completion; the condition provides that, "if from any cause whatever" the purchase is not completed, interest is to accrue; delay occasioned by the state of the title is not wilful default on the part of the vendor by means of which a purchaser can escape: *Sherwin* v. *Shakspear* (4); Seton on Judgments, 6th ed. p. 2250. The only qualification in the stringency of this condition is in the words "the purchaser in default," and that is an inaccurate

(1) (1877) 6 Ch. D. 153.
(2) (1887) 35 Ch. D. 390.
(3) (1874) L. R. 7 H. L. 158.
(4) (1854) 5 D. M. & G. 517.

BYRNE J. 1901 JONES v. GARDINER.

expression for "the purchaser of the lot in question as to which the delay occurs."

[BYRNE J. In Webster's Conditions of Sale, 2nd ed. p. 298, it is stated that a purchaser is not compelled to pay interest where the condition runs "the purchaser making default."]

As the vendor by arrangement is to have the rent of lot 22, the question of interest on the purchase-money is not worth insisting upon; but it is quite settled law that in the absence of fraud and bad faith a purchaser can only recover his expenses; he is not entitled to damages for the loss of his bargain: *Rowe* v. *London School Board* (1), where the result of *Bain* v. *Fothergill* (2) is carefully considered.

Eustace Smith, in reply.

Cur. adv. vult.

Dec. 2. BYRNE J., after stating the contract and condition 3 as above, continued:—The first question I have to decide arises upon the terms of condition 3, under which the vendor claims interest on the balance of the purchase-money from the date fixed for completion, October 22, 1900, to the actual date of completion, April 1, 1901. That condition, as I have said, contains the phrase "the purchaser in default" is to pay interest, and, with reference to the meaning of this qualification, I find in *Denning* v. *Henderson* (3) (a case for which I am indebted, and not for the first time, to Mr. Webster's very useful book on Conditions of Sale) it was decided that a purchaser could not be compelled to pay interest on his purchase-money where the condition as to interest for delay in completing was "the purchaser making default," and the delay was due to the state of the vendor's title. I am therefore of opinion that the plaintiffs, the purchasers in this case, were not in default within the meaning of this condition, and that the amount paid by them, without prejudice, for interest on the balance of purchase-money must be returned.

The next question is whether or not damages can be recovered for delay in completing a contract for sale of real estate, where

(1) (1887) 36 Ch. D. 619. (2) L. R. 7 H. L. 158.
(3) (1847) 1 De G. & Sm. 689; 17 L. J. (Ch.) 8.

the delay has been caused by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having cared, or troubled, or taken reasonable pains to perform his contract.

There is no question in the present case of want of good faith, as evinced by any desire to repudiate the contract, or of fraud; but, having carefully considered all the proceedings and the correspondence and the evidence, I am of opinion that a very considerable part of the delay which has occurred in carrying out the contract (after making full allowance for the time which may fairly be considered to have been due to difficulties in making out title, and to a controversy as to the form of the conveyance) has arisen entirely from the default of the vendor—default, that is, in doing what he could reasonably and fairly have done had he been duly careful to fulfil his contract. So far as the materials before me enable me to judge, the contract might certainly have been carried out, making a liberal allowance for delay in consequence of the difficulties and discussions I have referred to, three months earlier than the actual date of completion.

The case of *Bain* v. *Fothergill* (1) established what is now familiar law, namely, that a vendor of real estate, acting in good faith, is not liable to the purchaser in damages for loss of bargain, where he is unable to perform his contract owing to defect of title. He can recover the expenses he has been put to in investigating title, and what I may call proper conveyancing expenses, but nothing more. I see no reason to doubt that a similar rule ought to be applied where delay has taken place for a similar reason.

On the other hand, *Engell* v. *Fitch* (2), which was considered in *Bain* v. *Fothergill* (1), so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law.

(1) L. R. 7 H. L. 158. (2) (1869) L. R. 4 Q. B. 659.

BYRNE J.
1901
JONES
v.
GARDINER.

Jaques v. *Miller* (1) is a distinct authority for giving damages against a vendor, in addition to specific performance, in respect of delay caused by wilful refusal to carry out a contract, and for the measure to be applied in ascertaining the damages, namely, such damages as may reasonably be said to have naturally arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of contract.

This case was followed in *Royal Bristol Permanent Building Society* v. *Bomash.* (2)

I think that the plaintiffs were justified in bringing this action. I think they are entitled to a return of the interest paid without prejudice, the defendant taking what he can get from the tenant for the period between the named and the actual date of completion, there being according to the statement made by his counsel some arrangement as to this. I think that the plaintiffs are also entitled to reasonable damages, having regard to the measure as laid down in *Jaques* v. *Miller* (1), for the delay, and for not having vacant possession. I bear in mind that one of the lots was sold as for a building site, that both were sold as with possession, and that the purchasers intended to build and have been delayed in their work by the defendant's default. On the other hand, I have had regard to the fact that some of the claims in the plaintiffs' particulars are untenable and some exaggerated, while the evidence is loose and unsatisfactory, and I award 25*l.* by way of damages. The defendant must pay the costs of the action.

Solicitors: *Hempsons; Byfield & Son.*

(1) 6 Ch. D. 153.

(2) 35 Ch. D. 390.

W. C. D.

SMITH *v.* NORTHLEACH RURAL DISTRICT COUNCIL.

FARWELL J.

1901

Nov. 8.

[1898 S. 1138.]

Costs—Public Authority—Action against—Several Issues—Payment into Court as to one Issue—Denial of Liability—Action "proceeded with"—Acceptance of Payment—Discontinuance—Apportionment—Solicitor and Client Costs—Public Authorities Protection Act, 1893 (56 *& 57 Vict. c.* 61), *s.* 1 (*c*)—*Rules of Supreme Court*, 1883, *Order* XXII., *rr.* 6, 7; *Order* XXVI., *r.* 1.

Plaintiff sued a public authority for damages on several issues. Defendants paid money into court in respect of one issue, with a denial of liability. Plaintiff "proceeded with" the action, but ultimately accepted the sum paid into court in satisfaction of all the issues:—

Held—

(1.) Defendants must pay plaintiff her costs of the issue in respect of which the money was paid in, up to the date of that payment, and plaintiff must pay defendants their costs of the discontinued issues up to that date, and all their subsequent costs.

M'Ilwraith v. *Green*, (1884) 14 Q. B. D. 766, applied.

(2.) Defendants were not entitled to solicitor and client costs from the date of the payment in, as s. 1 (*c*) of the Public Authorities Protection Act, 1893, is confined to cases in which the action is "proceeded with" to judgment, and does not apply to a discontinuance under Order XXVI., r. 1, where money is paid into court under Order XXII. with denial of liability and not in satisfaction.

ADJOURNED SUMMONS.

This action was brought on March 24, 1898, for an injunction to restrain the defendants, who were providing a water supply for the town of Northleach under the provisions of the Public Health Act, 1875, from abstracting or diverting water from the plaintiff's mill-stream, and for damages.

By her amended statement of claim, delivered on November 28, 1900, the plaintiff alleged that the defendants had abstracted the water in three ways, namely:—

(*x*) By intercepting it while flowing in defined underground channels towards the stream:

(*y*) By abstraction from a tributary:

(*z*) By continuing to pump it from the stream after the

FARWELL J.
1901
SMITH v. NORTHLEACH RURAL COUNCIL.

revocation of a licence in that behalf granted by the plaintiff's predecessor.

By their amended statement of defence, delivered on April 4, 1901, the defendants traversed most of the allegations of the claim, and alleged that the licence was not revocable. With regard to (*z*), they also said that the alleged abstraction, if continued after the date of the alleged revocation, did not in any case continue after March, 1899, and while denying all liability for the same they brought into court the sum of 10*l*., and said that the same was sufficient to satisfy this part of the plaintiff's claim.

On June 10, 1901, the plaintiff obtained an order for certain particulars of the amended defence; and on August 12, 1901, the defendants delivered a reamended defence.

On October 25, 1901, the plaintiff gave the defendants notice that "the plaintiff accepts the sum of 10*l*. paid by you into court in full satisfaction of the causes of action in the statement of claim mentioned."

The case therefore resolved itself into a question of costs.

Butcher, K.C., and *Ashworth James*, for the plaintiff. The plaintiff is entitled to the general costs of the action, save so far as increased by the discontinued issues (*x*) and (*y*). The defendants are entitled to the costs of the discontinued issues, and to be reimbursed any additional expense to which they have been put by their joinder: *M'Ilwraith* v. *Green*. (1)

Jenkins, K.C., and *William Wills*, for the defendants. The true rule deducible from *M'Ilwraith* v. *Green* (1), read in connection with Order XXII., rr. 6, 7, and Order XXVI., r. 1, is that the plaintiff is only entitled to the costs of issue (*z*) up to the date of the payment in, and the defendants to the costs of the discontinued issues (*x*) and (*y*) up to that date. (2) A fair approximation will be obtained if the defendants pay the plaintiff one-third of her costs, and the plaintiff pays the defendants two-thirds of their costs, up to that date. (3)

(1) 14 Q. B. D. 766.
(2) Vide *Jenkins* v. *Jackson*, [1891] 1 Ch. 89.
(3) Vide *Roberts* v. *Jones*, [1891] 2 Q. B. 194.

From that date the defendants are entitled to solicitor and client costs on all the issues, as the action was "proceeded with" after the payment into court within the meaning of s. 1 (*c*) of the Public Authorities Protection Act, 1893. (1)

[FARWELL J. Surely that means "proceeded with" to judgment. How else does the plaintiff "recover" anything?]

The plaintiff "recovered" 10*l*. on accepting the sum paid into court. This is the meaning of "recover," tacitly adopted by the Courts in cases under the County Court Acts. Those Acts deprive the plaintiff of the costs of a High Court action if he "recovers" less than 20*l*. in contract or less than 10*l*. in tort, and the Courts seem to have assumed that the Acts apply to the case where the plaintiff takes out a sum paid into court in satisfaction of his claim. (2)

Clause (*c*) says nothing about a judgment. It says that "the defendant shall be entitled to costs to be taxed as between solicitor and client," whereas clause (*b*) provides that the judgment obtained by the defendant "shall carry costs as between solicitor and client." These expressions cannot be intended to have the same meaning: *Bostock* v. *Ramsey Urban Council*. (3)

Again, a consent order dismissing the action with costs has been held to be a judgment "obtained by the defendant"

(1) The Public Authorities Protection Act, 1893, provides as follows:—

Sect. 1: "Where . . . . any action . . . . is commenced . . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, ... the following provisions shall have effect:—

"(*b*.) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:

"(*c*.) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment. . . ."

(2) Vide *Pontifex* v. *Midland Ry. Co.*, (1877) 3 Q. B. D. 23; *Fleming* v. *Manchester, Sheffield and Lincolnshire Ry. Co.*, (1878) 4 Q. B. D. 81; *Howorth* v. *Sutcliffe*, [1895] 2 Q. B. 358.

(3) [1900] 2 Q. B. 616, 625.

FARWELL J. 1901 SMITH v. NORTHLEACH RURAL COUNCIL.

within clause (*b*): *Shaw* v. *Hertfordshire County Council.* (1) Should not the acceptance of the payment into court be treated for purposes of costs as equivalent to a consent order in favour of the plaintiff in respect to issue (*z*), and in favour of the defendants as regards issues (*x*) and (*y*)?

FARWELL J. As stated by Brett M.R. in *M'Ilwraith* v. *Green* (2), the plaintiff's notice of acceptance amounted to an acceptance of the payment into court in respect of issue (*z*), and a discontinuance as to issues (*x*) and (*y*)

Now comes the question of costs. I think the plaintiff is entitled to the costs of issue (*z*) in respect of which the 10*l.* was paid in up to the date of that payment, and that she must pay the defendants' costs of the discontinued issues (*x*) and (*y*) to that date, and all their costs incurred after that date. This seems perfectly plain, having regard to the judgment of Brett M.R. in *M'Ilwraith* v. *Green* (2), and to Order XXII., rr. 6, 7, and Order XXVI., r. 1.

To avoid difficulties of taxation, I adopt the defendants' suggestion and order the defendants to pay the plaintiff one-third of her costs up to the date of the payment in, and the plaintiff to pay the defendants two-thirds of their costs up to that date, and all their costs since that date.

The next point raises a curious question. The defendants, a public authority, being sued for acts done in the execution of their public duty, claim that any costs incurred by them since the date of the payment in must be taxed as between solicitor and client. This depends on the construction of s. 1 of the Public Authorities Protection Act, 1893. Clause (*b*) expressly points to the case where a judgment is obtained by the defendant. It has been held that a consent order in chambers dismissing the action with costs is a judgment within that clause: *Shaw* v. *Hertfordshire County Council.* (1) It has also been held that clause (*b*) does not take away the judge's discretion to deprive a successful defendant of costs altogether, but that if he gives the defendant costs they must be taxed as between solicitor and client: *North*

(1) [1899] 2 Q. B. 282. (2) 14 Q. B. D. 766.

Metropolitan Tramways Co. v. *London County Council* (1); *Bostock* v. *Ramsey Urban Council.* (2)

The present case arises under clause (*c*), which provides that, if the action is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum paid, he shall not recover any costs incurred after the payment, and the defendant shall be entitled to solicitor and client costs as from the time of the payment. Now, it appears to me that the framework of the whole section including clause (*c*) proceeds on the footing that the action is proceeded with to judgment, in which case the Court has a discretion as to giving the defendant any costs at all. This discretion does not arise unless the action is proceeded with to judgment. Again, the notice given by the plaintiff amounts to no more than this—that he accepts the money in satisfaction of that part of his claim in respect of which it was paid in and withdraws his other causes of action, as he is entitled to do under Order XXVI., r. 1. That rule provides: "The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue the action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action." The effect of the notice is to put an end to the action, wholly or in part, as the case may be, and no order of the Court is necessary for the purpose: the defendant does not "recover" anything by any judgment or order of the Court, but by virtue of the notice; and, in my opinion, the word "recover" in clause (*c*) means "recover by judgment," including a consent order, having regard to *Shaw* v. *Hertfordshire County Council.* (3)

(1) [1898] 2 Ch. 145. (2) [1900] 2 Q. B. 616.
(3) [1899] 2 Q. B. 282.

FARWELL J.
1901
SMITH v. NORTHLEACH RURAL COUNCIL.

The whole section is of a penal nature, giving a privileged position with regard to costs to public authorities sued for acts done in the execution of their duty. It must, therefore, not be extended to any case not exactly covered by its language. Local authorities have large powers of interfering with private rights, which powers they exercise at the expense of the rates, and not at the expense of their own pockets. The Legislature has thought it right that they should be protected in defending themselves from hostile actions, and that a plaintiff who sues them should risk having to pay solicitor and client costs, but that privilege cannot be extended beyond the express words of the statute. Now Order XXII., r. 1, contrasts payment in in satisfaction with payment in with denial of liability: in this case the defendant has paid in, denying liability: clause (*c*) of s. 1 of the Act expresses only payment into court in satisfaction of the plaintiff's claim; and I can see no good reason for extending these words to payment in with denial of liability. The costs must be taxed as between party and party.

Solicitors: *Peacock & Goddard, for Mullings, Ellett & Co., Cirencester; Blyth, Dutton, Hartley & Blyth, for Thomas & A. E. Mace, Chipping Norton, and Henry Temple Ravenor, Northleach.*

G. R. A.

FARWELL J.
1901
Nov. 20, 21.

In re BARON KENSINGTON. EARL OF LONGFORD *v.* BARON KENSINGTON.

[1901 K. 581.]

Will—Construction—Collective Devise of Real Estates—Aggregation of Charges—Exoneration of Personal Estate—Locke King's Acts (Real Estate Charges Acts), 1854, 1867, 1877 (17 & 18 *Vict. c.* 113; 30 & 31 *Vict. c.* 69; 40 & 41 *Vict. c.* 34).

Since Locke King's Acts a collective devise of lands of any tenure to the same set of persons primâ facie throws the aggregate charges on to the aggregate lands in exoneration of the testator's personal estate.

Ratio decidendi of *Talbot* v. *Earl Radnor*, (1834) 3 My. & K. 252; 41 R. R. 64; *Fairtlough* v. *Johnstone*, (1865) 16 Ir. Ch. Rep. 442; *Syer* v. *Gladstone*, (1885) 30 Ch. D. 614; *In re Hotchkys*, (1886) 32 Ch. D. 408, and *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511, explained and applied.

ORIGINATING SUMMONS.

By his will dated August 5, 1898, the fifth Baron Kensington, after appointing the plaintiffs executors and trustees of his will, devised his freehold hereditaments in London and Middlesex to the use that his mother should receive a yearly rent-charge of 1000*l.* a year, and subject thereto to the use of his trustees for the term of 1000 years for raising portions, and subject thereto to the uses thereinafter declared of his freehold hereditaments in Wales. And the testator devised his freehold hereditaments in Wales and all other his real estate to the use of his brother the Hon. Hugh Edwardes, now the sixth Baron Kensington, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of his brother the Hon. Cecil Edwardes for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of his brother the Hon. George Henry Edwardes for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the testator's own right heirs. And the testator bequeathed all his leasehold hereditaments to his trustees upon trust to pay the rents and perform the covenants of the several leases, and subject thereto to hold the same upon such trusts as should

FARWELL J.
1901
BARON KENSINGTON, *In re.*
EARL OF LONGFORD *v.* BARON KENSINGTON.

correspond with the uses declared concerning his freehold hereditaments in Wales, or as near thereto as the nature of the premises would permit. And, after bequeathing a sum of 20,000*l.* to his trustees upon trust for certain legatees, the testator bequeathed his residuary personal estate to his trustees upon trust to pay his funeral and testamentary expenses and debts, and the legacies bequeathed by his will or any codicil thereto, and to stand possessed of the residue upon the trusts which would be applicable thereto if the same had arisen from a sale of his freehold hereditaments in Wales, and so that the same should be deemed to be impressed with a trust for the investment thereof in the purchase of freehold hereditaments.

The testator died on June 24, 1900, seised of considerable freehold estates in London and Wales.

On January 12, 1900, the testator had contracted to purchase the St. Bride's estate in Wales for 60,000*l.*, and had paid 4000*l.* deposit, leaving a vendor's lien of 56,000*l.* thereon. The executors completed the purchase, but, as the property was said to be worth somewhat less than 56,000*l.*, the question arose whether the real estate must bear the whole 56,000*l.* under Locke King's Acts (The Real Estate Charges Acts), or whether the deficit on St. Bride's estate must be borne by the personal estate.

The testator was also entitled to a leasehold house in Portland Place, subject to a mortgage for 10,000*l.* The house realized 8000*l.*, and the question arose whether the real estate must bear the deficit.

As the personal estate, if liable to bear these deficits, would be insufficient to pay the legacies, this summons was issued to determine the point.

No tenants in tail were yet in existence.

Austen-Cartmell, for the executors and trustees.

Jenkins, K.C., and *Gurdon*, for the legatees. The whole 56,000*l.* is thrown on St. Bride's estate by Locke King's Acts, and therefore the devisees of that estate must bear it. As it is said to be worth somewhat less than that amount, they would of course disclaim it, if it were their only devise. But, as it is

devised en masse with the other Welsh freeholds, they cannot disclaim this onerous devise and accept the beneficial devises. They must take the devises as a whole, although some are of a negative value: *Green* v. *Britten* (1); *Guthrie* v. *Walrond* (2); *In re Hotchkys* (3); *Frewen* v. *Law Life Assurance Society*. (4) The same rule applies to the leasehold house.

Butcher, *K.C.*, and *Ashworth James*, for the first life tenant. Apart from Locke King's Acts, the pure personalty would have had to bear the whole 56,000*l.* and 10,000*l.*

Locke King's Acts throw the burden primarily on the incumbered property, but impose no personal liability on the devisees. A devise, therefore, of several estates in one gift to one set of devisees does not consolidate the testator's mortgages against the devisees for the benefit of the personal estate; but if there is a deficiency on any estate, the personal estate must bear it: *Syer* v. *Gladstone*. (5)

In *Green* v. *Britten* (1) and *Guthrie* v. *Walrond* (2) the devisees, taking other benefits, were not allowed to disclaim onerous leaseholds. They therefore became personally liable to pay the entire rent out of their own pockets. In the present case the devisees do not seek to disclaim St. Bride's estate, but they incur no personal liability in accepting it. If the executors were to realize their charge by sale in the open market, the devisees could buy the estate at its market price. Where is there any equity to compel them to pay more? The same result would have happened if the executors had not completed, and the vendors had resold to the devisees at the market price. The vendors' remedy for the deficit would have lain in contract against the executors. What right of recoupment would the executors have had against the devisees?

In re Hotchkys (3) was a case as between life tenant and remainderman of the same two properties. It was held that, if it was for the benefit of both properties together to repair the unincumbered property, the trustees might do it

(1) (1872) 42 L. J. (Ch.) 187.
(2) (1883) 22 Ch. D. 573.
(3) 32 Ch. D. 408.
(4) [1896] 2 Ch. 511; 65 L. J. (Ch.) 787; 75 L. T. 17.
(5) 30 Ch. D. 614.

FARWELL J.
1901
BARON KENSINGTON, *In re.*
EARL OF LONGFORD *v.* BARON KENSINGTON.

out of both properties subject to adjustment as between life tenant and remainderman, and there are dicta to the effect that a similar rule might be applicable to the mortgage interest if the question arose.

Lindley L.J. says (1): "If" the incumbered property "was sold for a sum which would not pay the mortgages in full, I do not see how" the unincumbered property "could be made liable for the deficiency."

[FARWELL J. That is only an interlocutory suggestion.]

Frewen v. *Law Life Assurance Society* (2) decided that the life tenant must pay the interest out of all the properties without adjustment. But there, again, the question was between life tenant and remainderman of the same properties.

North J. says (3): "Then it is said that it would be absurd to say that if the English estates had been divided among different tenants for life the contention now set up by" the remainderman "could prevail. I agree. It is just because they are not given to different tenants for life, but given to one person as a whole, that the contention of" the life tenant's assignees, "it seems to me, cannot prevail."

In this case the contest is between the realty, which is given to one set of persons, and the personalty, which is given to a different set of persons, and the last-mentioned authorities, with the exception of the above passages, have no bearing.

No doubt the testator might have aggregated the charges by express words; but the mere devise of the estates in one mass shews no such intention: *Syer* v. *Gladstone*. (4) Suppose a testator has two freeholds, namely, Blackacre, unincumbered, and Whiteacre, mortgaged by himself for more than its value. He devises his freeholds to his heir-at-law, and his personalty to his statutory next of kin. Does this shew any intention that the deficit on Whiteacre is to be borne otherwise than if he had died intestate? Again, unless a tenant in tail resettles the leasehold house which vests in him at his birth, it will devolve in a different line to that of the freeholds. This is an

(1) 32 Ch. D. 413.
(2) [1896] 2 Ch. 511; 65 L. J. (Ch.) 787; 75 L. T. 17.
(3) [1896] 2 Ch. 518.
(4) 30 Ch. D. 614.

additional reason for leaving it to bear its own burden, even if it does not make it a separate gift.

Bramwell Davis, K.C., and *Beaumont*, for the second life tenant, adopted the same arguments.

Phipson Beale, K.C., and *J. D. Rogers*, for the portionists.

Jenkins, K.C., who was not called on to reply, mentioned that the *Law Times* report of *Frewen* v. *Law Life Assurance Society* (1) contains the following note: "The reporter has examined the papers in the case of *Syer* v. *Gladstone* (2), and finds that no question respecting the use of the furniture or the application of the proceeds of sale thereof was before the Court."

FARWELL J., after stating the facts, and observing that under Locke King's Acts the heirs or devisees of incumbered lands of any tenure were not entitled to have the incumbrances discharged out of any other estate of the testator or intestate, but that while the rights of incumbrancers remained unaffected, yet, as between the different persons claiming under the testator or intestate, the incumbered lands were primarily liable for the payment of the incumbrances, continued:—Now I have, first of all, to construe the will to see whether the testator has in fact given his real property and his leasehold property as one aggregate gift, or whether there are two or three different gifts. The rule of law is well settled that where there are two distinct gifts to the same person, one being onerous and the other beneficial, the donee may disclaim the onerous gift and take the other. If, however, the onerous and beneficial property are included in the same gift, primâ facie the donee cannot disclaim the onerous and accept the beneficial property, but must take the whole or none. First of all, therefore, as a question of construction, I have to consider whether or not there is one gift of an aggregate whole. In my opinion, as regards the property contracted to be bought, there can be no question that it was given in one gift with the other real estate. The testator gives all his freehold hereditaments in Wales and all other his real estate to the devisees. Saint Bride's estate passes under that gift. It is

(1) [1896] 2 Ch. 511; 65 L. J. (Ch.) 787; 75 L. T. 17, 21. (2) 30 Ch. D. 614.

FARWELL J.
1901
BARON KENSINGTON, *In re.*
EARL OF LONGFORD *v.* BARON KENSINGTON.

one indivisible gift, and there is no ground for saying it is not a gift of an aggregate mass. Further than that, inasmuch as the leaseholds are given on the same trusts, the gift is, so far as the difference in the nature of freeholds and leaseholds will admit, given as one with the freehold property. The division of the gifts into two is simply a proper mode of conveyancing in carrying out one aggregate gift to the same persons so far as the law will allow in the manner usual among conveyancers and most convenient in practice. It would be impossible for me to hold that the leasehold estate was a separate gift within the meaning of the rule I have referred to without holding that there could never be one indivisible gift of an aggregate property of freeholds and leaseholds.

That answers the life tenants' argument that it is conceivable that in the future the leaseholds may devolve in a different way to that of the freeholds, because they may vest in a tenant in tail who may possibly not resettle them. That is too remote a consideration to countervail the clear aggregate gift which I find in this will.

Then is there anything in the authorities that prevents me from so holding? First of all, it is stated by Cotton L.J. in *In re Hotchkys* (1) that it does not depend on the question whether it is given in one sentence or two sentences; nor does it, in my opinion, depend on the fact that one property is freehold and the other leasehold. I have taken the opportunity of looking at several cases since the Court adjourned yesterday. There is a case of *Talbot* v. *Earl Radnor*. (2) It is rather shortly reported, and, as the papers were sent to Cusack Smith M.R. during the hearing of *Fairtlough* v. *Johnstone* (3), I take the statement of the will from the Irish report. By his will, dated before the Wills Act, 1837, the testator gave a leasehold house with its appurtenances to his sister Elizabeth Ackerley, "To hold the same unto my said sister Elizabeth Ackerley, her executors, administrators and assigns, for the residue of my term and interest therein at the time of my decease." He then proceeded to devise his real estate to trustees on various trusts, and the trustees were to pay to his

(1) 32 Ch. D. 408.
(2) 3 My. & K. 252; 41 R. R. 64.
(3) 16 Ir. Ch. Rep. 442, 450.

wife an annuity of 700*l.* a year. Then various other annuities were given, and among others this: "To my said sister Elizabeth Ackerley an annuity of 200*l.* for her life, for her sole and separate use." Leach M.R. held that Elizabeth Ackerley could not accept the annuity and refuse to accept the leasehold, but was bound to take both, and he treated it as one aggregate gift. That is a strong decision to shew that, although the gifts are in two different parts of the will, and of such absolutely distinct natures as a leasehold house and an annuity, still the rule will apply if, on the true construction of the will, the Court determines that is the intention.

Now, in *Fairtlough* v. *Johnstone* (1) Cusack Smith M.R. had a somewhat different question to deal with. The testator bequeathed all debts which should be due to him, and all chattels which should be in his possession, and all other personal property to which he should be entitled at his decease, to his wife absolutely; and then he gave his real estate to her for life with remainder over in fee. He appointed his wife executrix. She proved the will, and went into possession of the real estate. The testator was lessee for years of a house which he had underlet at a rent lower than that reserved by the lease. The personal estate being insufficient to pay the rent, it was held that the wife was bound to keep down the rent of the house out of the rents of the real estate in exoneration of the inheritance. It is true that Cusack Smith M.R. founded his decision on evidence of the testator's intention, which he derived from the fact that the testator must have known that the leasehold, which he did not specifically mention, but which he gave as part of his personal property, was insufficient to meet its liabilities, because he had himself sub-let it at a rent less than the head-rent, and, therefore, he knew there was that liability. But he also assumes that in *Talbot* v. *Earl Radnor* (2) the testator knew that the rent reserved on the leasehold house was higher than could be obtained at his decease. I have examined the report of the case, but I am unable to ascertain on what that assumption is founded. It is true it is stated as a fact that the rent reserved by the lease

(1) 16 Ir. Ch. Rep. 442. (2) 3 My. & K. 252; 41 R. R. 64.

FARWELL J. 1901 BARON KENSINGTON, *In re.* EARL OF LONGFORD *v.* BARON KENSINGTON.

was higher than the house would let for at the testator's death; but that is merely a statement to shew why the question arose, and it is, with all respect, absolutely immaterial in considering the testator's intention at the date of his will, which, being before the Wills Act, spoke from the date of the will, as to the property therein comprised, and not from the death of the testator. If the fact was at all material, it should have been shewn that the testator when he made his will knew that the rent reserved by the lease was higher than the house would let for at his death. There was no such finding, and, so far as I can see, it was never suggested, and, with all respect, would have been irrelevant.

The case most strongly relied upon on behalf of the life tenants is *Syer* v. *Gladstone*. (1) That case, when carefully considered, is simply a decision on construction, Pearson J. coming to the conclusion that there were two distinct gifts, and not one aggregate gift. I need hardly say that one will is of very little assistance in the construction of another; but I can see the ground on which Pearson J. proceeded. One has to bear in mind the subject-matter of the gift, and the way in which it is expressed. The testator gave "his messuage or dwelling-house, known by the name of Terrace House, Richmond, and all his household goods and furniture, plate, linen, china, articles of ornament and vertu (not being ornaments of the person or articles of jewelry), books, prints, and other household effects, which at the time of his decease should be in, upon, or about the same, to Robert Gladstone and Henry Parkinson Sharp (the defendants to the suit), whom he appointed two of his executors, to permit his sisters, Mary Bell and Maria Bell (now Madame de Valdrome), during their joint lives, and the survivor of them during her life, to have the use and occupation of the said messuage or dwelling-house and premises, and the said furniture and other effects therein, or if the same should be let under the provisions thereinafter contained, to receive the rents and profits thereof," and so on. Pearson J. may have considered that, as the testator was giving a house subject to a mortgage, and furniture, which he contemplated the beneficiaries would probably enjoy in specie, and

(1) 30 Ch. D. 614.

which would produce no income, he did not intend that the two should be treated as one aggregate gift for the purpose of imposing on the furniture any liability which subsisted in respect of the freehold house. At any rate, the only decision was that on construction the gift in that case was not one aggregate gift, but two separate gifts of two separate items of property. He further held there was no personal liability on the donees under Locke King's Acts to indemnify the personal estate against the mortgage debt if the mortgage estate was insufficient. In the view I take of this will that is not material, because I have an aggregate gift. I should have observed that the note in the *Law Times* report of *Frewen* v. *Law Life Assurance Society* (1) bears out the view I have come to as to the true facts in *Syer* v. *Gladstone*. (2)

(1) [1896] 2 Ch. 511; 65 L. J. (Ch.) 787; 75 L. T. 17.

(2) 30 Ch. D. 614. By the courtesy of Messrs. Wordsworth, Blake & Co., who have given him their utmost assistance in the matter, the reporter is able to furnish the following supplementary note to the report of *Syer* v. *Gladstone* [1872 S. 269].

The reconveyance of the 10,000*l.* mortgage to the executors contained no release of the testator's personal covenant.

The executors having raised the point that the mortgaged house ought to bear its own burden, the sisters agreed to pay them 4 per cent. interest on the 10,000*l.* in lieu of the 5 per cent. interest originally secured by the mortgage. They paid this interest till January 1, 1880, and were willing to continue the payment, amounting to 291*l.* 3*s.* 4*d.*, up to September 29, 1880, the date fixed for completion of the purchase.

The plaintiffs, however, being of opinion that the sisters ought to pay interest after that date, issued the summons of December 15, 1882, which is accurately stated in the report. The two and half years' interest (less tax) then amounted to about 975*l.*, and the income of the purchase-money was stated in the summons to be 277*l.* The plaintiffs asked for payment of the difference, namely, 698*l.*

The apparent smallness of the amount, 277*l.*—vide *Frewen* v. *Law Life Assurance Society*, 65 L. J. (Ch.) 787, 790—is susceptible of the following explanation: It appears from the chief clerk's certificate that the 9500*l.* purchase-money was dealt with as follows: 950*l.* was paid into court to the credit of "proceeds of sale of Terrace House" on November 23, 1880, and invested in 962*l.* Consols. The balance, 8550*l.*, with 67*l.* interest, was paid to the same credit on July 1, 1881, and invested in 8490*l.* Consols.

On December 16, 1881, 294*l.* was ordered to be paid to F. Piggott out of the Consols and the income thereof for work, services, and disbursements in connection with the property, and on August 5, 1882, the balance less this 294*l.* was carried over to the general credit pursuant to an order of July 19, 1882.

FARWELL J.

1901

BARON KENSINGTON, *In re.* EARL OF LONGFORD *v.* BARON KENSINGTON.

Frewen v. *Law Life Assurance Society* (1) is very much in point, and puts the matter on an intelligible basis. As I under-

---

The summons was heard by the chief clerk, and on January 25, 1883, he made the following note, which indicates the point discussed before him: "I think that Miss Bell and Madame de Valdrome, having accepted the devise to them for life of Terrace House, took the same subject to the mortgage debt of 10,000*l.* then existing in their favour, but afterwards paid off by the trustees. They are liable to find 500*l.*, the amount of difference between the mortgage debt and the proceeds of sale, and to pay, according to arrangement, interest at 4*l.* per cent. on 10,000*l.* to the date fixed for completion of purchase, together with interest at the like rate on 500*l.* from that date to the day of payment into court. On consideration, I think the ladies are only liable to find 4*l.* per cent. on 500*l.* during their lives and life of survivor, but not the capital sum."

The matter then rested in abeyance until the summons and further consideration came on together in July, 1885.

The chief clerk's certificate, dated April 5, and filed April 25, 1885, set out all the facts as to the sale of the house and furniture, including orders of September 22, 1880, and March 20, 1882, for the payment of the income of the proceeds of sale of the furniture to the sisters for life or until further order.

Mr. Buckley indorsed his brief on the summons as follows: "Pearson J. 13th July, 1885. Dismiss the summons. Costs in the action. One order as indorsed on brief on further consideration."

By the order on further consideration (Pearson J., July 13, 1885, B. 2770; Mr. Ward, Registrar, Fo. 166), after referring to the summons, the Court (inter alia) declared that the sisters were entitled during their joint lives, and the survivor during her life, to the income of the moneys that had arisen from the sale of the furniture then represented by 2244*l.* Consols, standing to the credit "Proceeds of Sale of Terrace House Furniture," and ordered the sisters to pay to the general credit the sum of 291*l.* 3*s.* 4*d.*, being 4 per cent. interest on the 10,000*l.* mortgage (less income tax) from January 1, 1880, to September 29, 1880, when the mortgaged property was sold.

The case was originally reported on the assumption that Pearson J. had decided, not that there were separate gifts of the house and furniture, but that the aggregation rule did not apply to cases where the burden imposed no personal liability on the donee, and the head-note framed on this view passed at the time without criticism from the judge or the eminent counsel engaged. It is almost inconceivable that this can have been the case if, as stated in the *Law Times*, no question respecting the application of the proceeds of sale of the furniture was before the Court.

Subsequent authorities have negatived this view of the decision by pointing out that Pearson J. really treated the gifts as separate, and merely decided that Locke King's Acts imposed no personal liability on the donee of the onerous property. The latter view is strengthened by the present decision. As, however, the former view is still occasionally urged at the bar, this note is appended.—G. R. A.

(1) [1896] 2 Ch. 511; 65 L. J. (Ch.) 787; 75 L. T. 17.

stand it, it comes to this. If a man chooses to give divers items of property as one aggregate gift, the net beneficial interest which he gives to the donee, reckoned in pounds, shillings, and pence, is the net amount of the profits to be received after discharging the outgoings; in other words, an account of outgoings and receipts being taken, the ultimate benefit actually given as the result of an aggregate gift is the net balance. That seems to me to be the true meaning of saying that when there is a gift of an aggregate the donee cannot refuse a portion of it and take the rest. He is not given the property item by item, but he is given the net result of the whole. That really disposes of the life tenants' argument on Locke King's Acts. I need not consider the question whether there is a personal liability, because it does not arise. There is enough given in the aggregate to more than counterbalance the incumbrances which are to be set over against the benefits contained in that aggregate. The testator makes one gift of free property and property subject to a lien, which lien falls on the latter property under Locke King's Acts. It is immaterial from this point of view to consider whether the amount of the lien exceeds the value of that property. The testator has chosen to give the property subject to that burden, and the donees taking it cannot refuse to bear the burden whatever it may be. They fortunately receive at the same moment real property more than sufficient to counterbalance the excess of the burden, and, therefore, get an ultimate benefit. Otherwise they would disclaim the whole gift, and there would be an end of it; but if they are given a benefit, they must take that benefit with the burden which the testator has imposed. The same observation applies to the leasehold house which was mortgaged. That leasehold house was given subject to the mortgage, and the donees must take it subject to the mortgage, and that must be brought into the account as the proper way of ascertaining the real ultimate benefit given to the donees in the one aggregate gift.

Solicitors: *Fladgate & Co.; Gadsden & Treherne.*

G. R. A.

FARWELL J.

1901

Nov. 22.

In re HUXTABLE. HUXTABLE *v.* CRAWFURD.

[1901 H. 2089.]

Will—Charitable Legacy—General or limited Charitable Purposes—Admissibility of Evidence—Residue.

A testatrix by her will bequeathed 4000*l.* to A. "for the charitable purposes agreed upon between us":—

Held, that on the face of the will there was a gift, not for general, but for limited charitable purposes, and that evidence was admissible to shew what those purposes were.

In re Fleetwood, (1880) 15 Ch. D. 594, followed.

Held also, on the evidence, that there was a good charitable bequest of the income of the fund during the life of A., and that on his death the corpus would fall into the residue of the estate.

Commissioners of Charitable Donations and Bequests v. *Cotter*, (1841) 1 D. & War. 501, discussed.

THIS was an originating summons by the executors of the will of Susannah M. Huxtable to determine the question whether the legacy of 4000*l.* given by the will to the defendant Crawfurd, or any and what part thereof, was so given to him beneficially, or on any and what charitable or other trusts, or whether the same or any part thereof had failed.

The said testatrix died in March, 1901, having by her will dated August 7, 1899, bequeathed the sum of 4000*l.* to the defendant Crawfurd "for the charitable purposes agreed upon between us."

It appeared from the evidence that the testatrix and the defendant Crawfurd had been on terms of intimate friendship for many years, and that about the year 1891 she verbally informed him of her intention to leave him a sum of 4000*l.*, the income of which he was, in the exercise of his discretion, to apply during his life for the relief of sick and necessitous persons being members of the Church of England, and also towards the support of charities connected with the Church of England, and that he was to dispose of the principal after his death as his own property; that on subsequent occasions she

had declined to give him more specific directions about the income, stating that she was unwilling to fetter his discretion in the matter; and that at no time had she indicated any intention that the principal of the fund should be applied for charitable purposes.

Errington, for the executors.

Ashworth James, for the defendant Crawfurd. The legatee does not now claim any beneficial interest in the corpus of the fund. Assuming there is a good charitable gift of the income, it is submitted that the Court will not interfere with his discretion in the application of the income for the purposes agreed upon.

R. J. Parker, for the Attorney-General. The will was made years after the conversations with the defendant Crawfurd. On the face of the will there is a good bequest of the whole 4000*l.* for charitable purposes, and evidence is not admissible to limit the general charitable intent expressed in the gift. The case falls within the principle of *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1); *In re White*. (2) The authorities are summarised in Tyssen on Charitable Bequests, ch. xix. There must be a scheme for the whole fund.

Butcher, K.C., and *Christopher James*, for the residuary legatees. The case of *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1) is distinguishable. There, there was a general charitable intent. No definite instructions were given. Here, there is a limited charitable intent. The gift is only "for the purposes agreed upon," and evidence is admissible to shew what was agreed upon: *In re Fleetwood* (3); *In re Randell* (4); Theobald on Wills, 4th ed. pp. 64–5. It is not a case like *In re Boyes* (5), where the intentions of the testatrix were not communicated during her life to the legatee. This is really the case of a latent trust. When once it is established that the legatee is a trustee, evidence is admissible to shew what the trusts are. Here there is a limited and

(1) 1 D. & War. 501.
(2) [1893] 2 Ch. 41.
(3) 15 Ch. D. 594, 606.
(4) (1888) 38 Ch. D. 213.
(5) (1884) 26 Ch. D. 531.

FARWELL J. 1901 HUXTABLE, *In re.* HUXTABLE *v.* CRAWFURD.

definite trust of the income of the fund during the life of the trustee, to which the Court will give effect. After his death the corpus of the fund will go to the residuary legatees. [*In the Goods of Marchant* (1) was also referred to.]

FARWELL J. This is a case of some little difficulty. The gift is, "To my friend the Rev. Charles Hubert Payne Crawfurd I leave the sum of 4000*l.* sterling for the charitable purposes agreed upon between us." An affidavit has been put in by Mr. Crawfurd in which he states that the charitable purposes agreed upon were purposes which would end with his own lifetime. He does not himself now claim any beneficial interest in the fund, although he states that the intention was that, subject to his applying the income of the fund to charitable purposes during his lifetime, he was to have the corpus. That is not claimed for him now at the bar. Mr. Parker, for the Attorney-General, says there is a general charitable trust shewn, and that I ought not to regard the evidence, but should direct a scheme for the whole 4000*l.* I do not think I can do that. I quite agree that the evidence would not be admissible if it were to contradict the will—that is to say, supposing the affidavit had been that the lady was under a misapprehension, and she never agreed to any charitable purposes at all with him, that would be contradicting the will, and I do not think it would be admissible here. But here on the face of the will we have, not a general charitable purpose, but a limited charitable purpose, namely, for that actually agreed upon; and I do not see that there is any contradiction of the will in saying that "the charitable purpose agreed upon" exhausted the whole income of the fund, but lasted only for a limited time and did not go on for ever. I should have had some little doubt as to the admissibility of the evidence, if it had not been for the decision of Hall V.-C. in *In re Fleetwood.* (2) That is a decision more than twenty years old, and I certainly feel bound to follow it. If Mr. Parker had objected in form to my admitting the evidence, I should have overruled the objection on the authority of that case. The case he chiefly relied upon

(1) [1893] P. 254. (2) 15 Ch. D. 594.

was *Commissioners of Charitable Donations and Bequests* v. *Cotter*. (1) There, this particular question did not arise, because, the gift being to two reverend gentlemen "to be by them applied to charitable purposes according to my instructions deposited with the Rev. Andrew O'Connell," it appeared that no written instructions had been deposited with Mr. Andrew O'Connell; but his testimony was, "I had instructions given to me, but they were verbal, and general for charitable purposes, and with this proviso only, that the money was to be exclusively applied for charitable purposes." Then says the Lord Chancellor (2): "Here is an intention expressed consistent with the will: whether the Statute of Frauds may or not interfere with it, I do not think myself called upon to say, as I can decide without reference to the statute." If I may respectfully say so, I entirely agree. There was on the face of the will a general charitable intent, and so far as the parole evidence went it was exactly in accordance with that, and there was no difficulty at all. Here there is not on the face of the will a general charitable intent, but a limited charitable intent, namely, to the extent agreed upon. It seems to me I must admit the evidence on the authority of *In re Fleetwood* (3) to shew what the parties agreed upon. That being so, the scheme will be limited to dealing with the income of the fund during the lifetime of Mr. Crawfurd. But the purposes agreed upon seem to be sufficiently good purposes; and if the Attorney-General is satisfied, there need not be a scheme. But there will be liberty for him to apply for a scheme.

Solicitors for executors: *Bridges, Sawtell & Co.*

Solicitors for defendant Crawfurd: *Waltons, Johnson, Bubb & Co.*

Solicitors for defendant residuary legatees: *Clutton & Johnson.*

Solicitor for Attorney-General: *The Solicitor to the Treasury.*

(1) 1 D. & War. 501. (2) 1 D. & War. 508.
(3) 15 Ch. D. 594.

H. L. F.

BUCKLEY J.

1901

Nov. 6, 7.

In re FORD.
FORD *v.* FORD.

[1901 F. 135.]

Intestacy—Administration—Death of Universal Legatee and Sole Executrix before Testator — Advancements to Children — Hotchpot — Statute of Distributions, 1671 (22 & 23 *Car.* 2, *c.* 10), *s.* 5.

The provisions of s. 5 of the Statute of Distributions, directing advancements by the intestate in his lifetime by portions to his children to be brought into account, apply to an intestacy occasioned by a testamentary instrument becoming wholly inoperative by the death of the universal legatee and executrix in the lifetime of the testator, as well as to a case of actual intestacy occasioned by the non-existence of any testamentary instrument.

Harte v. *Meredith*, (1884) 13 L. R. Ir. 341, followed.

Adjourned Summons.

The only question raised on this application was whether the hotchpot provisions of s. 5 of the Statute of Distributions applied to an intestacy occasioned by a wholly inoperative will, or must be confined to cases of actual intestacy.

R. W. Ford, who died in September, 1900, by his will of May, 1848, devised and bequeathed the whole of his real and personal estate to his wife absolutely, and appointed her sole executrix. The wife died in 1892. Letters of administration with the will annexed had been granted to the testator's two eldest sons. A summons for the administration of the testator's real and personal estate had been taken out upon which the usual administration order had been made. There were seven children, to some of whom advances were alleged to have been made by their father, the testator, during his lifetime, and the master accordingly suggested that a summons to the following effect should be issued: "Whether or not an inquiry should be added to the order for administration of the testator's estate, directing an account of what advances (if any) have been made to each or any of the next of kin of the testator during his lifetime." This summons was adjourned into Court and now came on for argument.

H. Terrell, K.C., and *J. G. Wood*, for the plaintiffs. The provisions of s. 5 of the Statute of Distributions, directing advancements to children by the intestate in his lifetime by way of portions to be brought into account, only apply to cases of absolute intestacy, and do not apply to a case like the present, where there is a will, although that will is inoperative: *Vachell* v. *Jeffereys* (1); *Wheeler* v. *Sheer* (2); *Cowper* v. *Scott* (3); *Wilkinson* v. *Atkinson.* (4) The Court will not allow a trust to fail by reason of the death of the trustee; so in the present case the fact that the executor also predeceased the testator makes no difference; the administrator with the will annexed is a trustee for the next of kin, who take as if the residue had been actually given to them: *Walton* v. *Walton.* (5) In the present case, therefore, there is a complete will, and the dictum in *Walton* v. *Walton* (5) covers the present case. *Stewart* v. *Stewart* (6), so far as it deals with the present question, is only a dictum, and *Harte* v. *Meredith* (7) is inconsistent with the earlier authorities, and is not binding on this Court.

[*Williams* v. *Arkle* (8) was also referred to.]

Astbury, K.C., and *Gatey*, for the defendants, the administrators with the will annexed. In all cases of intestacy the Statute of Distributions has to be resorted to in order to ascertain who are entitled, and the shares; and in ascertaining the shares of children, provision is made for advancements made by the intestate in his lifetime to his children by way of portions, and these advancements have to be accounted for to make the shares of the children equal. Where the statute applies, it applies in its entirety. The dictum in *Walton* v. *Walton* (9) was not approved of by Jessel M.R. in *Stewart* v. *Stewart* (6), and *Harte* v. *Meredith* (7) is a decision on this very point, and is in favour of this contention that the statute applies in its entirety whether the intestacy arises from an inoperative will, or from the entire absence of any testamentary

(1) (1701) Prec. Ch. 170.
(2) (1730) Mos. 289 (288 and 301 Fol. Ed.).
(3) (1731) 3 P. Wms. 119.
(4) (1823) T. & R. 255.
(5) (1807) 14 Ves. 318, 324.
(6) (1880) 15 Ch. D. 539.
(7) 13 L. R. Ir. 341.
(8) (1875) L. R. 7 H. L. 606, 615.
(9) 14 Ves. 324.

BUCKLEY J.
1901
FORD, *In re.* FORD *v.* FORD.

document. The intention of the Statute of Distributions is stated in *Edwards* v. *Freeman*. (1)

[Williams on Executors, 9th ed. vol. ii. p. 1370, was also referred to.]

Ingpen, K.C., and *Brodie Cooper*, for a daughter who had not been advanced, adopted this argument, and contended that the inquiry asked for by the summons ought to be directed.

H. Terrell, K.C., in reply.

BUCKLEY J., after shortly stating the facts, continued:—The question I have to determine is whether, for the purposes of s. 5 of the Statute of Distributions, this testator has died testate or intestate. I should have thought the answer that would immediately have occurred to any one would be, that inasmuch as he executed a testamentary instrument which became altogether inoperative by the death of the beneficial devisee and legatee and executrix in his lifetime, he died intestate. I am told that is not so, but that he died testate.

Several cases have been referred to, and I will just summarise in the first instance those cases, and what appears to be their result. In all of them (except in an Irish case to which I will refer) there was the appointment of an executor, who survived the testator and proved the will. There was, therefore, no intestacy as regards the legal interest in the testator's personalty. In all of them there was a disposition of some part of the testator's estate beneficially, and there was only an intestacy as to one-seventh, or one-fourth, or some part of the estate. The statement of these facts shews that this case differs from those; but now let me pass on to see what is the principle upon which those cases were decided. They discriminate between a total intestacy and a partial intestacy. Inasmuch as in every case there was no intestacy at all as regards the legal estate, it appears to me that discrimination must be between total intestacy and partial intestacy as regards beneficial interest.

In the first of those cases, *Vachell* v. *Jeffereys* (2), there were executors who proved, and there was a beneficial disposition

(1) (1727) 2 P. Wms. 435. (2) Prec. Ch. 170.

of some part of the estate. The question was whether the advancement clauses of the Statute of Distributions applied or not, and the third question and resolution of the Court was this: Whether the married daughter's portion should be brought into hotchpot; and it was decreed that it should not, but she could have her share with the rest, and the difference as to bringing into hotchpot was said to be between persons dying wholly intestate and dying intestate quoad a surplus. It seems to me obvious that must mean, dying intestate as to the beneficial interest wholly, or dying intestate as to a surplus of the beneficial interest, because there was no intestacy as to the legal interest.

In *Wheeler* v. *Sheer* (1) there was again a beneficial disposition of some part of the estate, and there was a surviving executor. The question there was whether the custom of York was excluded by the testator having disposed of his estate, and what was held was (2): "Here are executors, and the residue of the personal estate is devised to them, so this case is within the express words of the statute"—that is, the statute 4 & 5 Will. & Mary, c. 2, which gives the testator power of disposition—"Then the question is, for whom the executors are to be trustees, not for those who are to take by the custom, by the very letter of the statute"—that is, the statute of Will. & Mary—"but for those who are entitled by the general law, and the testator devised the residue, to put it out of the custom, so the distribution must be made to the next of kin of Sir George Wheeler." I take out of its date another case, because it is in pari materiâ with that I have just referred to—that is, *Wilkinson* v. *Atkinson* (3), which is a decision of Sir Thomas Plumer. There was a surviving executor, and a beneficial disposition of three-fourths, but a lapse as to one-fourth.

The next case is *Cowper* v. *Scott* (4), a decision of Sir Joseph Jekyll. There six-sevenths were disposed of, and there was intestacy as to one-seventh, and a surviving executor. There again, therefore, the case was not like this case.

There is no case, as far as I know, other than the Irish case,

(1) Mos. 288.
(2) Ibid. 302 (Fol. Ed.).
(3) T. & R. 255.
(4) 3 P. Wms. 119.

BUCKLEY J. 1901 FORD, *In re.* FORD *v.* FORD.

in which there has been a decision upon either a total intestacy as regards the beneficial interest, or that with something more —namely, an intestacy as to the appointment of an executor. None of these cases go to that. The authorities do not seem to me to cover this case.

Then what is put in argument is this: It is said this man's will was not wholly inoperative, it must be read as if he had bequeathed to X. Y., and had appointed him executor as trustee for A. B., and in case A. B. dies in the testator's lifetime, then for the testator's next of kin; that I must insert in the will a trust for the next of kin (which is the expression commonly used), meaning the persons entitled under the Statute of Distributions, and that, therefore, there was an operative will. Suppose I am to read it in that way, what would be the result? Let us suppose that X. Y. survived, and that there is, therefore, a valid appointment of executor, it seems to me that the statute of William then comes into operation (11 Geo. 4 & 1 Will. 4, c. 40), and then I must take it that the executors are to be deemed to be trustees for the person or persons, if any, who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of. Now, who would those persons be? They would be certain persons to be ascertained from the Statute of Distributions—that is to say, the widow and the children. It is not denied that, as between those persons, the distribution will not be equal, but that I must have regard to the fact that the Statute of Distributions gives the widow a third and the children two-thirds amongst them. But then it is said, although I must do that much with the Statute of Distributions, I must disregard the provisions of the statute as to taking into account advances which were made to children. Is that right? I confess I have a great difficulty in seeing how, if you are to apply the statute at all, you can do so and not give to a child that which the statute gives it—namely, an equal share, or such sum as, with an advance made in the testator's lifetime, will make up a share equal to the other children's.

In *Stewart* v. *Stewart* (1) the late Sir George Jessel dealt

(1) 15 Ch. D. 539.

with that question, and commented upon a dictum—for it is but a dictum—of Sir William Grant in a case of *Walton* v. *Walton*. (1) In *Walton* v. *Walton* (1) the facts were these: Upon the marriage of the testator's daughter certain marriage articles had been prepared. It does not appear by the report what took place upon that, whether they were simply locked up in the testator's desk and never handed to anybody, or whether the marriage took place upon the faith of them. Having regard to the decision at which Sir William Grant arrived, it was not necessary to decide what were the facts as to that. The testator, when he came to make his will, wrote at the foot of a copy of the articles a memorandum by which he confirmed those proposals, and then, in consideration of his daughter's marriage with Mr. Richard Marnell (who was the husband), the testator ordered and directed that all his property and effects "should be vested in Richard Marnell, preferable to any executor or administrator, upon and after my decease for all and every the purposes in my said agreement expressed or intended." The question was argued whether under that, Richard Marnell, after having given effect to the 1700*l.*, which was the obligation of the testator under the articles, took the residue in trust for the next of kin or beneficially, and Sir William Grant held that he took beneficially. The question as to the advancement therefore did not arise; but, after having so decided, Sir William Grant went on to say this (2): "This executor therefore has made out his right to the residue. My opinion upon this point puts an end to the question upon Mrs. Marnell's advancement: but I will just say, that I conceive the provision in the Statute of Distributions applies only to the case of actual intestacy; and, where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take, as if the residue had been actually given to them. Therefore the child, advanced by her father in his life, could not be called on to bring her share into hotchpot." For the purposes of that dictum I must take it that the learned judge is making the assumption that the child had been advanced by the father in his lifetime. That dictum does not necessarily go beyond the case where

(1) 14 Ves. 318. (2) 14 Ves. 323.

BUCKLEY J. 1901 FORD, *In re.* FORD *v.* FORD.

there is an effective appointment of an executor (by which I mean the appointment of an executor who survives the testator), and does not therefore necessarily apply to this case. However, commenting upon that, Sir George Jessel in *Stewart* v. *Stewart* (1), after reading Sir William Grant's words, says this: "Then he goes on to say something about the advances in the lifetime, which I think has no application, because the law is different from what it was supposed to be in his time; which was that advancement did not apply to a share of residue. It is not quite accurate to say the executor is a trustee for the next of kin, because it never was so in Courts of Equity; he was always a trustee for the persons entitled under the Statute of Distributions, and though Sir William Grant uses the words 'next of kin,' that is what he means. It is a little inaccurate, but it sufficiently expresses what the law was. I do not like to impute inaccuracy to Sir William Grant without some authority, but I find authority in the language of the statute." And then the Master of the Rolls read the words of the statute of 11 Geo. 4 & 1 Will. 4, c. 40, and goes on to say: "The statute by its recital shews two things: First of all, that the trust is for the persons entitled under the Statute of Distributions; and, secondly, that the executors were held to be trustees for them. Trustees, perhaps, by implication; but, as Sir William Grant says, the effect of the implication was identically the same as if the testator had said, 'I bequeath the residue of my personal estate to my trustees upon trust for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions if I had died intestate.' Now what do the words 'if I had died intestate' import? Not merely the persons but the shares. It has been held over and over again that where you refer to intestacy coupled with a reference to the statute you mean not only that the persons take under the statute, but that they take the same shares as they would have taken under the statute; and, consequently, again referring to the recital I have read, I find the law of the Courts of Equity was exactly the same as if the testator had bequeathed the residue of his personal estate to his executors upon trust for the persons who would be entitled to such estate under the Statute of Distri-

(1) 15 Ch. D. at p. 543.

butions, and in the same shares as they would have taken under that statute."

Even if, therefore, I were entitled to treat this case as if it were one of a trust imposed upon the conscience of a trustee who died in the lifetime of the testator—in which case, of course, the trust would not fail of taking effect, in accordance with a well-known principle that a trust will not fail by the death of the trustee—the trust would be for the persons entitled under and upon the principle of the Statute of Distributions. When you look at the Statute of Distributions you will find that it applies to the case where the Ordinary, or the other person who by the Act is enabled to make distribution of the estate is dealing with the estate—that is to say, it is dealing with cases where a person other than the executor is the person to divide. It appears to me that is exactly the case here. There is no executor here, the testator having appointed a person who could not be his executor, because that person died in his lifetime. Then administration is taken cum testamento annexo. That can make no difference. In this case the will has no effect, and distribution is made by the administrator. The 5th section of the statute, it appears to me, takes effect, and the man has for all purposes died intestate. I should therefore, unassisted by the decision I am just going to mention, have arrived at the conclusion that the statute applied, and that the advancement words of the Statute of Distributions ought to have their effect. But, in point of fact, the exact point has been decided in Ireland in a case of *Harte* v. *Meredith* (1), and, although that is of course an Irish case and the decision is not binding upon me, I should have hesitated long to differ from a decision upon the exact point. I do not, however, find any reason at all to differ; and, for the reason I have given, I arrive at the same conclusion and follow the decision in that case. The inquiry asked for by this summons should therefore, in my opinion, be directed.

Solicitors: *Ford & Co.; Rowcliffes, Rawle & Co.; Carr, Scott, Smith & Gorringe.*

(1) 13 L. R. Ir. 341.

BUCKLEY J.

1901

Nov. 12, 13.

BENNETT *v.* STONE.

[1899 B. 2648.]

Vendor and Purchaser—Conditions of Sale—Interest on Purchase-money—Wilful Default—Dispute as to Wording of Conveyance—Specific Performance Order for Account of Rents and Profits—Vendor in Occupation of Land Sold—Occupation Rent—Farming Losses.

By an agreement for the sale of real estate it was provided that if from any cause whatever other than wilful default on the part of the vendors the purchase was not completed on January 2, 1899, the purchase-money should bear interest at 5 per cent. A dispute arose about the wording of the conveyance, and the purchase was not completed on the day fixed; the purchaser brought an action for specific performance, and Buckley J. held that the vendors had been wrong in the dispute and gave judgment for specific performance with costs. The master by his certificate found that interest was payable on the purchase-money, and the purchaser took out a summons to vary the certificate by disallowing the interest, on the ground that the delay had been caused by the wilful default of the vendors:—

Held, that there had been no wilful default on the part of the vendors, and that the delay had not been caused by the dispute about the form of the conveyance.

The definition of wilful default given in *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, has only been modified to the extent that in *In re London Corporation and Tubbs' Contract*, [1894] 2 Ch. 524, it was held that cases of honest mistake did not constitute wilful default. No distinction has been drawn for this purpose between mistakes of title and mistakes of conveyance.

After the commencement of the action one of the farms agreed to be sold fell vacant. The vendors did not let it, but occupied it themselves, paid the valuation of the outgoing tenant, and farmed the land:—

Held, that under the account of rents and profits directed by the order for specific performance (which was not on the footing of wilful default) the vendors must be charged with rents and profits, and the proceeds of sale of crops actually received, but not with an occupation rent; that they were entitled to be allowed what they had paid for the valuation and the expenses of realizing the crops, but not for the losses incurred in farming.

ADJOURNED SUMMONS.

By an agreement of September 26, 1898, the defendants agreed to sell to the plaintiff at the price of 75,000*l.* the Stoneleigh estate, near Epsom; and by clause 2 1000*l.* was to be paid as deposit, the purchase was to be completed on January 2,

1899, "and the purchaser paying his purchase-money at the date aforesaid shall as from that day be let into possession or into receipt of the rents and profits, and up to that day all rents, rates, taxes, and outgoings shall (if necessary) be apportioned, and if from any cause whatever other than wilful default on the part of the vendors the completion of the purchase is delayed beyond the before-mentioned day, and this assignment shall not be cancelled and the deposit forfeited by the vendors under the last clause hereof, the purchase-money shall bear interest at the rate of 5*l.* per cent. per annum from that day to the day of actual payment thereof."

The deposit of 1000*l.* was paid, but the purchase was not completed on January 2, 1899, and in fact the purchase had not yet been completed or the balance of the purchase-money paid. The draft conveyance furnished by the purchaser contained words assuring to him the benefit of covenants which had been entered into by one William Cunliffe with the vendors to do certain things with respect to the land.

The proviso inserted by the purchaser was as follows: "Together with the full benefit of the covenants on the part of the said William Cunliffe with the said Edward Mulready Stone and Frederick William Stone contained in the said indenture of the 29th day of August, 1898." The defendants admitted that he was entitled by the agreement to the benefit of the covenants, but they substituted for the purchaser's words the following: "but with the benefit of the covenants on the part of the said William Cunliffe with the said Edward Mulready Stone and Frederick William Stone contained in the said indenture of the 29th day of August, 1898. (So far as the said Edward Mulready Stone and Frederick William Stone are now in law or in equity entitled to assign the benefit of such covenants without thereby warranting that such covenants are now enforceable by the assigns of the said Edward Mulready Stone and Frederick William Stone.)" The purchaser objected to the alteration, and on June 22, 1899, commenced an action for specific performance.

Buckley J. on February 2, 1900, held that the vendors were wrong in insisting on their addition, and made an order for

BUCKLEY J.
1901
BENNETT v. STONE.

specific performance of the contract. The order as drawn up went on to direct that interest (if any) should be computed on the balance of the purchase-money from January 2, 1899, when the same ought to have been paid according to the terms of the agreement; and that the following accounts should be taken, namely: "1. An account of the rents and profits of the said hereditaments received by the defendants, or by any other person or persons by the order or for the use of the defendants since the 2nd day of January, 1899. And it is ordered that what shall be coming on the said account of rents and profits be deducted from the amount of the purchase-money and interest when so computed as aforesaid." The vendors were also ordered to execute a conveyance and pay the costs of the action.

By his certificate, made on June 13, 1901, the master found that there was due to the defendants by the plaintiff 74,000*l.*, the balance of the purchase-money, and 866*l.* 12*s.* 6*d.* for interest thereon at 5 per cent. per annum from January 2, 1899. He also found that the defendants had received rents and profits of the estate since that date 776*l.* 18*s.*, and that they had paid, or were entitled to be allowed on account thereof, sums to the amount of 1797*l.* 6*s.* 10*d.*, leaving a balance due to them of 1020*l.* 8*s.* 10*d.*

The 1797*l.* 6*s.* 10*d.* was made up in this way. The tenant of one of the farms agreed to be sold by the defendants to the plaintiff gave notice to quit at Michaelmas, 1899. The defendants, after informing the plaintiff of this, did not attempt to get a tenant for the farm, but took possession of it and worked it themselves. In order to do this they had to pay to the outgoing tenant a valuation of 469*l.* 11*s.* 9*d.*, and purchase horses, stock, and agricultural implements. The 1797*l.* 6*s.* 10*d.* included the amount thus spent, and also a considerable sum representing the loss they had incurred up to the date of the certificate in working the farm.

The defendants had received rent in respect of other farms included in the purchase, and had sold crops off the farm which they occupied.

The plaintiff took out a summons to vary the certificate,

(1.) by disallowing the 8661*l.* 12*s.* 6*d.* for interest, and that it might be declared that no interest was due to the defendants; (2.) by disallowing the 469*l.* 11*s.* 9*d.*, with a direction that the disallowance was to be without prejudice to his claim against the defendants for not recovering damages from the outgoing tenant for dilapidations; and by disallowing all payments relating to farming the land and purchase of stock and agricultural implements; (3.) that, if interest were allowed, (i.) the payments relating to farming and purchase of stock and agricultural implements might be disallowed, and the defendants charged with an occupation rent for the land they had farmed, and accounts and inquiries for this purpose; (ii.) an inquiry what deterioration (if any) had taken place in the premises; and a declaration that the plaintiff was entitled to set off against the interest the amounts thus found due by the defendants under (i.) and (ii.).

H. Terrell, K.C., and *Sheldon*, for the summons. The delay has been caused by the wilful default of the vendors, and the purchaser is not liable to pay interest. It has been held in the action that they were wrong in insisting on the insertion of the restrictive words, specific performance was ordered, and they were directed to pay the costs. It is true that the question of wilful default was left open; but the judgment shews that the vendors had not given to the purchaser everything to which he was entitled. The delay was caused by their refusal to execute a proper conveyance, and they ought not to be allowed to take advantage of that delay to charge us with interest. The definition of wilful default given by Bowen L.J. in *In re Young and Harston's Contract* (1) has been modified in *In re London Corporation and Tubbs' Contract* (2) by the statement that it did not apply to cases of honest mistake or oversight, and that such cases did not constitute wilful default; but the authorities cannot be reconciled on that ground. The true principle upon which they have been decided is that there is a distinction between mistakes of title and mistakes of conveyance. The Court has always refused to treat mistakes of

(1) 31 Ch. D. 168. (2) [1894] 2 Ch. 524.

BUCKLEY J. 1901 BENNETT v. STONE.

title as wilful default. Honest mistake is a sufficient defence where it is a mistake of title, but not where it is a mistake of conveyance. In *In re Hetling and Merton's Contract* (1) there was an honest mistake; but it was a mistake of conveyance, and was held to be wilful default. That was also the case in *In re Wilsons and Stevens' Contract.* (2) On the other hand, in *In re London Corporation and Tubbs' Contract* (3), *North* v. *Percival* (4), and *In re Woods and Lewis' Contract* (5), the mistake was a mistake of title, and was held not to be wilful default. The vendors in this case have made a mistake of conveyance, and that is wilful default. It is a default because they refused to give the purchaser what he was entitled to; and it was wilful because they were free agents and knew what they were doing, and chose to act in this way. It is not reasonable to suppose that the purchaser intended to make himself liable to pay interest for so long a time to an amount greater than the rents of the property: *De Visme* v. *De Visme* (6), which was not overruled on this point in *Sherwin* v. *Shakspear.* (7) Therefore, there was wilful default on the part of the vendors, and the evidence shews that it was the cause of the delay.

The other point arises on the certificate. The master was wrong in allowing to the vendors all the expenses and losses incurred by them in taking possession of and farming part of the land agreed to be sold. The vendors ought to have endeavoured to get a fresh tenant for the farm; but they made no attempt to do so, and the amount they paid for the valuation should not be allowed: *Phillips* v. *Silvester* (8); *Earl of Egmont* v. *Smith.* (9) The order was the common order for an account of rents and profits, and under that they are chargeable with rents and profits actually received by them, and with an occupation rent for the farm of which they took possession: *Metropolitan Ry. Co.* v. *Defries.* (10)

(1) [1893] 3 Ch. 269.
(2) [1894] 3 Ch. 546.
(3) [1894] 2 Ch. 524.
(4) [1898] 2 Ch. 128.
(5) [1898] 1 Ch. 433; [1898] 2 Ch. 211.
(6) (1849) 1 Mac. & G. 336, 347.
(7) (1854) 5 D. M. & G. 517.
(8) (1872) L. R. 8 Ch. 173.
(9) (1877) 6 Ch. D. 469.
(10) (1877) 2 Q. B. D. 189.

[BUCKLEY J. You cannot ask for that under an order which is not made on the footing of wilful default.]

At all events, they cannot be allowed the losses incurred in carrying on the farming business. "Profits" in the order do not include profits of a business carried on on the land. If the purchaser had known what the vendors were going to do he would have asked for an account on the footing of wilful default; but, as it is, the decree does not affect what has taken place since it was made.

Astbury, K.C., and *Dunham*, for the vendors. The insertion of the restrictive words was an honest mistake, and cannot be treated as wilful default. In order to constitute wilful default there must be an intention to make default. There must be an intention to do the act, and also an intention to make default. That is shewn by the remarks of Bramwell L.J. on misconduct in *Lewis* v. *Great Western Ry. Co.* (1) When the vendors inserted the words they did not intend to delay completion; the evidence shews that they were pressing the purchaser to complete. Delay was not the necessary consequence of their action.

[They were stopped on these points.]

The master was right in making the allowances in the vendors' favour on the accounts. It was impossible to procure a tenant of the vacant farm. Owing to the contract for sale an incoming tenant could have obtained no such fixity of tenure as would have induced him to pay the valuation of the outgoing tenant. There is no direction in the order that accounts are to be taken on the footing of wilful default; so the vendors were not bound to let the farm: they were only bound to keep the land in cultivation. For the same reason they cannot be charged with an occupation rent. No doubt they must account for the rents of the rest of the property which they have received, and the value of the crops they have sold; but they are entitled to all expenses as just allowances, and the result of the account taken in that way is that there is more to be allowed to them than paid by them. If the farming business had been carried on at a profit, the

(1) (1877) 3 Q. B. D. 195, 206.

BUCKLEY J. 1901 BENNETT v. STONE.

purchaser would have taken that profit as "rents and profits" of the land.

H. Terrell, K.C., in reply.

BUCKLEY J. stated the facts, and continued:—The first question in this case is, therefore, whether, when a vendor is wrong as to some words to be contained in the conveyance, that is a wilful default for the purpose of such a clause as this.

The authorities as to what is wilful default in such a clause as this are very numerous. The parties have been content to rely on authorities of a recent date, and they have cited to me some half a dozen cases of which *In re Young and Harston's Contract* (1) is the first. In that case Bowen L.J. used words which have always been referred to and cited since as to what, in such a contract as this, is the meaning, first, of the word "wilful"; and, secondly, of the word "default." Those words stand wholly untouched, so far as I can see by any subsequent decision, except that they are modified by the language which the Court of Appeal used in the case of *In re London Corporation and Tubbs' Contract* (2), where Lindley L.J., after referring to what Bramwell L.J. had said in *Lewis* v. *Great Western Ry. Co.* (3), and what Bowen L.J. had said in *In re Young and Harston's Contract* (1), goes on to say that Lord Bramwell's words are, in his opinion, "quite consistent with Lord Bowen's observations in *In re Young and Harston's Contract* (1), if it be borne in mind that Lord Bowen presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight." I think, after that expression in Lindley L.J.'s judgment, Lord Bowen's words in *In re Young and Harston's Contract* (1) are to be read as modified, if there be any modification in it, in that sense that Lord Bowen was not addressing himself to an honest mistake or oversight; and if there be an honest mistake or oversight, that will not be a wilful default.

The result of the authorities, I think, is this: that by

(1) 31 Ch. D. 168. (2) [1894] 2 Ch. 524.
(3) 3 Q. B. D. 195, 206.

the word "wilful" is meant that the vendor, being a free agent and in a position to do either one of two acts, chooses to do the one and not to do the other; and that "default" includes the case where the vendor, owing to the purchaser the duty to act reasonably in all matters relating to completion, does an act in breach of that duty. The vendor owes to the purchaser, among other things, the duty of acquainting himself with all the material facts, and it will be a breach of his duty if, knowing the facts, he elects to do an act which is not reasonable, or if he neglects to acquaint himself with the facts, and, consequently, does an act which is not reasonable. It is not necessary to shew intentional delay or wilful obstruction; but it is necessary to shew that the vendor has committed an act of default. This is not satisfied by shewing that by mistake or oversight he has done something which he ought not, or has omitted to do something which he ought to have done. Lord Bramwell, in the words to which I have referred in *Lewis* v. *Great Western Ry. Co.* (1), was dealing with the words "wilful misconduct," and not "wilful default"; and, therefore, what he says is only applicable by way of analogy. His words are these: "'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful." If I may venture to appropriate that language to myself with a variation, I should say that "wilful default" means that, not the act, but the default must be wilful. You must predicate of the act that it is a particular class of act. It is not enough to shew that the act is wilful; what you must shew is that the default is wilful, which means that you must predicate that the act is one of a particular kind.

Now, of the half a dozen cases which have been cited, in three of them it was held that there was not, and in three that there was, an act of wilful default. It was held in *In re Young and Harston's Contract* (2) that it was wilful default for a vendor to go abroad two days before the date fixed for completion, with the result that he could not execute the conveyance because he was not there to execute it. It was held in

(1) 3 Q. B. D. 195, 206. (2) 31 Ch. D. 168.

BUCKLEY J. 1901 BENNETT v. STONE.

In re Hetling and Merton's Contract (1) that the vendor who knew he had to complete, and who relied upon a power of attorney enabling somebody else to sign his name for him, which was not in point of fact sufficient for the purpose, had been guilty of wilful default; and it was held in *In re Wilsons and Stevens' Contract* (2) that a vendor who did not obtain admittances to certain copyholds, so as to be in a position to complete at the date of completion, was guilty of wilful default. Contrasted with those cases are these: *In re London Corporation and Tubbs' Contract* (3), where the mistake was that the vendor erroneously described his title to some part of the premises; *In re Woods and Lewis' Contract* (4), which was a case of an unknown defect of title; and, lastly, *North* v. *Percival* (5), where the question between the parties was whether the contract included thirty-six acres or forty-two acres. The purchaser insisted that it was thirty-six acres only; the vendor said he must take the forty-two acres or nothing. The purchaser was held entitled to specific performance—the purchaser succeeded, but it was held that the vendor's repudiation of the contract by resisting the claim to specific performance did not constitute such wilful default as to disentitle him to interest.

Now, looking at those several decisions, in each case where it was held to be wilful default the vendor was doing an act which was not a reasonable act, having regard to his duty to be ready to complete. The man ought not to have gone abroad; the man ought not to have neglected to look at his power of attorney to see if it was good enough or not; the man ought not to have neglected to get the copyhold admittances; it was his duty to have prepared himself to complete, and he had not done so. On the other cases it has been argued before me, as to two of them at any rate, that they were cases in which the vendor had made a mistake in his title, and that the Courts are lenient to people who make a mistake in title, because it is not easy to know whether you

(1) [1893] 3 Ch. 269.
(2) [1894] 3 Ch. 546.
(3) [1894] 2 Ch. 524.
(4) [1898] 1 Ch. 433; [1898] 2 Ch. 211.
(5) [1898] 2 Ch. 128.

have a good title or not, and that it was upon that ground that the vendor succeeded. I cannot find that that was the ground of the decision. It seems to me that in *In re London Corporation and Tubbs' Contract* (1) the Court did not put it upon the ground that the mistake was a mistake of title, but upon the ground that the vendor had been the victim or had been guilty of an honest mistake or oversight. The ground of the decision was that he had honestly made a mistake, not that he had made a mistake as to title. Lindley L.J.'s judgment upon that seems to me plain. If he was going to rest his judgment upon the ground of a mistake of title that ground would have been sufficient to support the whole decision; and what was the reason of his qualifying Lord Bowen's words in *In re Young and Harston's Contract* (2), by saying they did not refer to oversight, if he was going to decide on another ground?

It seems to me that what I have to look to is this: whether these vendors in this case have made an honest mistake. Now, during the argument I asked this question once or twice without receiving any answer which was in the plaintiff's favour: Is there any case to be found in the books in which a question has arisen between vendor and purchaser as to the form or language or contents of the conveyance in which ultimately on the litigation of the question it turned out that the purchaser was right and the vendor was wrong, and that was held to constitute wilful default? There is no such case to be found. Such a question must have arisen over and over again, and, if such a proposition could be maintained, I should have expected to find an authority to that effect. The particular matter here is simply this. The agreement having been executed in September, 1898, the vendors had been pressing the plaintiff repeatedly from that time onwards to complete, and he did not complete. I think he could not complete because he had not got the money. The conveyance had been exchanged on May 23, 1899, and had been approved of on behalf of both parties. It came back on June 22 in a form which, as I held at the trial, the vendors had wrongly insisted on. On the same day,

(1) [1894] 2 Ch. 524. (2) 31 Ch. D. 168.

BUCKLEY J. 1901 BENNETT v. STONE.

June 22, the plaintiff issued his writ in this action. The result was that he got specific performance, and he got his costs, because, in my view, the party in the wrong must pay the costs; whether the vendors were honestly or not in the wrong they had occasioned the costs, and they must pay them. But when you come to the question of wilful default it is a different one altogether. It seems to me that these vendors thought the proper way to carry into effect this agreement of September 26, 1898, was to put those words in; but I think that was not wilful default within the meaning of the contract.

That is not the only ground upon which I decide this case. It is quite plain after *In re London Corporation and Tubbs' Contract* (1) that what I have to look to in the case is not necessarily solely, was there wilful default, but was the wilful default the causa causans of the delay; because the Court there, although they differed, Kay L.J. dissenting as to what was wilful default, were all of opinion that if there had been wilful default the delay was not attributable to that cause.

I need not go in detail into the facts. I am satisfied that from 1898 until June 22, 1899, the vendors had been repeatedly pressing the purchaser to complete his contract. He had not got the money to do so and was seeking to get it here and there, and they were unable to obtain completion, and the completion failed to take place really upon the ground that he had not got the money, and, for aught that appears, the plaintiff up to the present moment is not provided with the money to complete the purchase. If there was a wilful default, which I think there was not, that was not, in my opinion, the causa causans of the delay. The purchaser has not been out of his money; he has simply been keeping the defendants out of their money; and I see no reason to deprive them of the 5 per cent. interest which they contracted for in 1898. I think, therefore, the summons to vary the master's certificate as to interest fails.

Then the next point is this. The judgment directs an account of the rents and profits of the said hereditaments received by the defendants or by any other person or persons by their order or for their use since January 2, 1899. As

(1) [1894] 2 Ch. 524.

regards some part of the property, there have been tenants in occupation during the whole period since the execution of the contract, and those rents would be brought in as a charge. As regards a large part of the property, some 400 out of 666 acres, the tenant gave up possession on September 29, 1899, and when he went out the vendors had to pay a sum of 469*l.* 11*s.* 9*d.* for his tenant right. They did not subsequently let that farm; they went into possession themselves, and for the purpose of working the farm they bought horses, carts, seeds, and various things which were wanted, with the result that they are entitled according to the certificate to be allowed a sum of 1797*l.* 6*s.* 10*d.*, in which sum is included the 469*l.* 11*s.* 9*d.* which I have just mentioned. It will be noticed from what I have said that this decree contains no account upon the footing of wilful neglect or default; it is simply an account of rents and profits received by them or for their use. It seems to me that in taking that account they are to be charged, of course, with the rents which they received; but I find no machinery there for charging them with an occupation rent of the land which they did not let. That would be chargeable under a decree on the footing of wilful default; but that is not in the decree. They are chargeable, therefore, only with the rents they received. Then what are they to be allowed as against that? It seems to me they must be allowed the 469*l.* 11*s.* 9*d.* which they had to pay to the outgoing tenant upon his leaving the premises; that was a necessary disbursement in connection with the taking over of that property from that tenant. But they ask for something more than that; they ask for losses incurred by carrying on the business after they had taken it over and when they did not let it. Evidence has been filed in which it is disputed whether they could have let the farm or not. That would have been material if there had been an account on the footing of wilful neglect and default, but I do not think it is material on this account. It seems to me that as a result of this I cannot say, and I do not mean to say, that the defendants are not entitled to get from the plaintiff anything in respect of this expenditure, but I do say that they are not entitled to it under this decree. I do not see how in a

BUCKLEY J. 1901 BENNETT v. STONE.

decree directing an account of rents and profits they can have an account of business carried on by them upon the premises which has resulted in a loss. Whether it was necessary or not I do not know; it is not in the decree. The plaintiff is entitled to an account of the rents and profits, and amongst that will come into the account the proceeds of the crops upon the land; the plaintiff will be charged with the 469*l.* 11*s.* 9*d.* which was paid for the crops to the outgoing tenant, and he will be able to charge the defendants, I apprehend, with the proceeds of the sale of those crops, and the defendants will be able to charge the plaintiff with the necessary expenses of realizing those crops.

Solicitors: *Richard Davies & Son; Henry White.*

H. C. R.

BUCKLEY J. 1901 *Oct.* 25; *Nov.* 28.

In re EBENEZER TIMMINS & SONS, LIMITED.

Company—Shares paid for otherwise than in Cash—Omission to file Contract—Signatory to Memorandum—Subsequent Agreement—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

Seven persons signed the memorandum of association of a company, formed for carrying on a business, for specified numbers of shares amounting in the aggregate to 750 shares. On March 3, 1893, the company was incorporated. The total capital consisted of 1000 shares, of which 750 were mentioned in the memorandum, and 118 had been issued and paid for in cash, leaving a balance of 132 shares. The memorandum and articles referred to an agreement between the signatories and the company for the sale of the business to the company, and this agreement was executed on March 4, 1893. It referred to the 750 shares, and stated that they were to be fully paid shares. On March 22 it was filed under the Companies Acts, and on April 15 the 750 shares were allotted to the signatories. The signatories were advised that they were liable to pay for the 750 shares in cash, and applied to the Court for liberty to file a memorandum stating that the shares were issued to them as part of the consideration for the assignment of the business:—

Held, that the 750 shares must be taken to have been issued at the date of the registration of the company; that the fact that the shares were identified, in the sense that the parties intended the shares referred to in the agreement and allotted to the subscribers to be the same as those for which they signed the memorandum, was not sufficient to enable the

Court to allow a memorandum to be filed; there was no company in existence at the date of their signature, so there could not then be a contract to pay for these shares otherwise than in cash, and there could not be a subsequent contract for that purpose.

In re F. W. Jarvis & Co., Limited, [1899] 1 Ch. 193, and *In re Archibald D. Dawnay, Limited*, W. N. (1900) 152, followed.

In re Whitehead & Brothers, [1900] 1 Ch. 804, distinguished, on the ground that in that case all the shares in the company had been taken by the signatories.

MOTION.

Ebenezer Timmins, being entitled to a certain business, made his will on April 19, 1888, and thereby devised and bequeathed the business premises and business to two of his sons upon trust that they should transfer the property to a joint stock company, to be formed of the testator's seven children; and the testator provided that there should be allotted to each of his children a certain specified number of shares, amounting in the aggregate to 515, and that there should be allotted to the trustees of his will 235 further shares upon trust for his wife for life, and after her death upon trust in specified numbers for his said seven children, and he provided that all the above shares should be fully paid shares. His wife predeceased him. At his death, therefore, under the provisions of his will, each child was under the above scheme entitled absolutely to a certain specified number of shares, making 750 in all.

After his death the company was formed, and on March 3, 1893, was incorporated. Each of the seven children signed the memorandum of association for exactly the number of shares to which as above he or she was entitled, making the aggregate of 750 shares. The total capital consisted of 1000 shares. Further shares to the number of 118 had been issued and paid for in cash, making 868 in all, leaving a balance of 132 shares. The memorandum of association of the company stated that one of the objects of the company was to enter into and carry into effect an agreement referred to in art. 3 of the articles. This clause specified a draft agreement, and provided that the company should enter into it and carry it into effect. On March 4, 1893, the agreement was executed by the seven children and the company. It was an agreement for the sale

BUCKLEY J. 1901 EBENEZER TIMMINS & SONS, LIMITED, *In re.*

of the property to the company. It recited the will, and provided for the allotment of the above-mentioned numbers of shares to the seven children respectively (making 750 shares in all), and that they should be fully paid shares, and that they should be allotted in execution of the trusts of the will. On the same March 4, 1893, as appeared by the minute-book, the company's seal was affixed to the agreement, and on March 22 that agreement was duly filed under the Companies Acts. On April 15 it was resolved that shares to the number given above be allotted to the seven children, and that share certificates be sealed and signed and issued to them, and that was done. The seven children were advised that as signatories of the memorandum of association they were liable to pay for their shares in cash, and they now applied by motion for an order that they might be at liberty to file with the Registrar of Joint Stock Companies a memorandum in the form in the schedule to the notice of motion, and that upon such memorandum being filed within thirty days it should, in relation to the shares numbered 1 to 750 inclusive, operate as if it were a sufficient contract in writing within s. 25 of the Companies Act, 1867, and had been duly filed with the registrar before the issue of such shares.

The schedule was as follows: "Be it remembered that 750 fully paid shares of 20*l.* each, numbered 1 to 750 inclusive in the above-named company, were issued to the signatories of the memorandum of association of the company, the number of shares issued to each being the number set opposite the signatories to the said memorandum, in part satisfaction of the consideration for the assignment to the company of the business and property mentioned in an indenture of the 4th of March, 1893, and registered with the Registrar of Joint Stock Companies on the 22nd of March, 1893."

Stewart-Smith, for the motion. The Court can give leave to file this memorandum, although by signing the memorandum of association the children must be taken to have agreed to pay for the shares in cash. The point is not covered by *In re F. W. Jarvis & Co., Limited.* (1) That case was

(1) [1899] 1 Ch. 193.

distinguished by Cozens-Hardy J. in *In re Whitehead & Brothers* (1) on the ground of the identification of the shares. In the present case we can also prove the identity of the shares specified in the memorandum with those mentioned in the agreement.

Sect. 1 of the Companies Act, 1898, is in general terms; the words in sub-s. 1, "as if it had been duly filed with the registrar aforesaid before the issue of such shares," must be read with sub-s. 4, which says that the Court may direct that a memorandum should be filed where it is satisfied that the filing of the requisite contract "is impracticable." They do not cut down the operation of the section to cases in which a contract might have been filed and was not.

[BUCKLEY J. referred to *Dalton Time Lock Co.* v. *Dalton.* (2)]

Assuming that there was a contract to take these shares in consideration for the business, that would have been a case within s. 1. The shares would have been issued for a consideration other than cash, and no contract has been filed. It has never been held that "shares" in s. 1 mean shares which have been issued at a time when a contract could have been filed. In *In re F. W. Jarvis & Co., Limited* (3), there was no means of identifying the agreement or the shares. Here the agreement is referred to in the memorandum of association and the articles, and it gives the numbers of the shares. That shews that from the first it was the intention of all parties that the 750 shares should be taken as fully paid.

[BUCKLEY J. No doubt you intended to take shares for which you were not to pay in cash; but was not that an illegal bargain? If you could not file the contract before the shares were issued, the intention could not be effectuated. There was no company in existence which could make a contract; so you could make none, and you could not legally agree not to pay in cash for the shares for which you subscribed the memorandum.]

The Act is remedial, and there is nothing to shew that the Court is not to exercise the jurisdiction in such circumstances. In *In re F. W. Jarvis & Co., Limited* (3), there were sufficient

(1) [1900] 1 Ch. 804. (2) (1892) 66 L. T. 704.
(3) [1899] 1 Ch. 193.

BUCKLEY J.
1901
EBENEZER TIMMINS & SONS, LIMITED, *In re.*

shares to make a double allotment. Here there were some more shares, but not enough to do that. Sect. 25 of the Act of 1867 is repealed by the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 33. That does not apply to this company, but it has been held that the Court still has power to direct that a memorandum should be filed: *In re Brutton & Burney, Limited.* (1)

Cur. adv. vult.

Nov. 28. BUCKLEY J. This was a motion made before me on October 25 last by certain shareholders in Ebenezer Timmins & Sons, Limited, for an order enabling the applicants to file a memorandum under s. 1 of the Companies Act, 1898, protecting certain shares as fully paid. I allowed the motion to stand over in order that the applicants might supplement their evidence. A further affidavit has now been filed, and I am in a position to deliver judgment. [His Lordship stated the facts, and continued:—]

To the extent to which the company had on April 15 shares available for allotment, the allotment as fully paid up of shares pursuant to the agreement was properly protected by a registered contract. The object of the present application is to file a memorandum stating that 750 fully paid shares were issued to the signatories to the memorandum in part satisfaction of the consideration for the assignment of the business mentioned in the agreement of March 4, 1893, which was registered on March 22, 1893.

Upon the facts I am satisfied that the shares referred to in the agreement and allotted on April 15 are identified with, in the sense that they were meant to be the same as, those for which the memorandum of association was subscribed. But this does not, in my judgment, enable me to make the order which is asked. To say that the parties intended that they should be the same shares is one thing, and to say that they legally contracted that they should be the same is another. They could not so contract. When the memorandum of association was signed and the company was registered,

(1) [1901] 1 Ch. 637.

there was at once a contract to take and pay. The sale agreement was not yet in existence, and there could not legally be a contract to satisfy the one contract arising upon registration of the company by rights to arise under another contract intended to be entered into with the company after it was registered.

Since the decision of the Court of Appeal in *Dalton Time Lock Co.* v. *Dalton* (1) it must be taken as settled that the shares for which the children subscribed the memorandum of association were, for all purposes material to the present application, issued on the day on which that memorandum was registered, and that the subscribers then came under liability to pay for those shares in cash. It was not in 1893 competent to them subsequently to contract that these shares should be paid for in some other way, or should be superseded and replaced by other shares to be issued under an agreement subsequently executed and registered. It is, in my judgment, made out by this memorandum of association and art. 3 of the articles and the draft agreement thereby identified that the parties did intend that the shares for which they subscribed the memorandum should be paid for in manner provided by the agreement; but, inasmuch as they could not as the law then stood enter into such a contract, the matter is not thereby advanced. The case, in my opinion, is governed by the decision of Romer J. in *In re F. W. Jarvis & Co., Limited* (2), which was followed in *In re Archibald D. Dawnay, Limited.* (3) As regards the decision of Cozens-Hardy J. in *In re Whitehead & Brothers* (4), I need only say that in my judgment that decision does not govern the present case. For here the total number of shares is not (as it was there) exhausted by the 750 shares in question and the 118 shares otherwise issued. To the extent of the balance of 132 shares at least there remained and remain in the present case shares capable of being allotted under the memorandum of association.

This application cannot be used for the purpose of evoking a decision as to what, if any, liability there is in respect of the subscription of the memorandum of association.

(1) 66 L. T. 704.
(2) [1899] 1 Ch. 193.
(3) W. N. (1900) 152.
(4) [1900] 1 Ch. 804.

BUCKLEY J. 1901 EBENEZER TIMMINS & SONS, LIMITED, *In re.*

I refuse the motion, and I do so with the less reluctance by reason of the fact that s. 33 of the Companies Act, 1900, has now repealed s. 25 of the Companies Act, 1867, and has provided that no proceedings under s. 25 shall be commenced after the commencement of that Act. This section might become of importance in case it were sought to enforce liability under the subscription of the memorandum of association.

Solicitors: *W. W. Wynne & Sons, for Joseph Burton, Runcorn.*

H. C. R.

BUCKLEY J. 1901 *Dec.* 4.

In re BOLES AND BRITISH LAND COMPANY'S CONTRACT.

[1901 B. 2758.]

Vendor and Purchaser—Trustee for Sale—Retirement—Purchase of Trust Property—Sale to Ex-trustee Twelve Years after his Retirement.

Apart from any circumstances of doubt or suspicion, there is no rule of the Court that a person, who has ceased for twelve years to be a trustee of an instrument which contains a trust for sale, cannot become a purchaser of property subject to the trust.

ADJOURNED SUMMONS heard on an agreed statement of facts.

By his will dated December 18, 1884, the Rev. J. T. Boles devised and bequeathed his mansion-house and lands, called Ryll Court, Exmouth, and all the real and personal estate which should belong to him at his death or of which he should then have power to dispose by will, and which he had not thereby otherwise disposed of, to his sons F. J. C. Boles, R. H. Boles, and D. F. Boles, and his son-in-law E. A. Browne (whom he also appointed executors) upon trust for sale and conversion.

The testator died on May 27, 1885, and on June 16, 1885, his will was proved by the first three executors. On July 27, 1885, the fourth trustee disclaimed the office. On August 4, 1885, the three trustees paid off a mortgage on the testator's

property, and took a reconveyance of the land to themselves to be held by them on the trusts of the will.

Clause 5 of the statement of facts was as follows:—

"By deed-poll under the hands and seals of the said Dennis Fortescue Boles, Francis James Coleridge Boles, and Richard Henry Boles, dated 11th November, 1885, the said Dennis Fortescue Boles thereby declared that he was desirous of being discharged from the trusts of the said will, and the said Francis James Coleridge Boles and Richard Henry Boles thereby consented to the discharge of the said Dennis Fortescue Boles. And by the same deed the said Dennis Fortescue Boles, Francis James Coleridge Boles, and Richard Henry Boles, declared that (inter alia) the said premises known as Ryll Court should thereupon vest in the said Francis James Coleridge Boles and Richard Henry Boles alone for the purposes of the subsisting trusts of the said will, and for all such estate and interest as they and the said Dennis Fortescue Boles had therein respectively immediately before the execution of that deed-poll."

On November 13, 1897, F. J. C. Boles and R. H. Boles, the continuing trustees, sold the Ryll Court estate under the trust for sale to D. F. Boles for 5325*l.*

On May 3, 1901, the British Land Company, Limited, agreed to buy the land from D. F. Boles for 6000*l.*

By their requisitions on title the purchasers took the objection that D. F. Boles was and acted as a trustee under the will; that it did not appear that he had been discharged from the trusts with the consent of all the beneficiaries with a view to the purchase; and that he was, therefore, disqualified from buying the property.

The vendor denied this proposition, and an originating summons was taken out by the purchasers to determine the question.

There was no evidence of the circumstances of the retirement of D. F. Boles from the trust further than the statement contained in paragraph 5, which is set out above.

T. L. Wilkinson, for the purchaser. The rule which precludes

BUCKLEY J.
1901
BOLES AND BRITISH LAND COMPANY'S CONTRACT, *In re.*

a trustee for sale from buying property the subject of the trust applies to him after he has ceased to be a trustee. The fact that twelve years have elapsed since his retirement does not release him from the restriction. He may be freed by arrangement with his cestuis que trust if they are all sui juris or agree that he should retire and become a purchaser; or he may obtain the sanction of the Court: *Ex parte Lacey* (1); *Ex parte James* (2); *Coles* v. *Trecothick* (3); Lewin on Trusts, 10th ed. p. 552. If he does not do this he remains disqualified.

H. Wace, for the vendor. There is no authority on the question of a sale to a trustee who has retired, but I submit that after a reasonable time he becomes qualified to purchase. The retirement in this case was carried out in the ordinary way under s. 32 of the Conveyancing Act, 1881. There is no evidence to shew what the vendor's motives were in retiring beyond the statement of the deed in the agreed statement of facts.

[He was stopped by the Court.]

BUCKLEY J. stated the facts, and proceeded:—Apart from any circumstances of doubt or suspicion, is there any rule of this Court that a person, who has ceased for twelve years to be a trustee of an instrument which contains a trust for sale, is precluded from becoming a purchaser of property subject to the trust? I think there is not. The principle that lies at the root of this matter is that a trustee for sale owes a duty to his cestuis que trust to do everything in his power for their benefit, and is therefore absolutely precluded from buying the trust property, irrespective of questions of undervalue or otherwise, because he may be thus induced to neglect his duty. Beyond that, if he retires with a view to becoming a purchaser so as to put himself in a position to do what would otherwise be a breach of trust, that will not do. But if he has retired and there is nothing to shew that at the time of the retirement there was any idea of a sale, and in

(1) (1802) 6 Ves. 625; 6 R. R. 9. (2) (1803) 8 Ves. 337; 7 R. R. 56.
(3) (1804) 9 Ves. 234; 7 R. R. 167.

fact there is no sale for twelve years after his retirement, is there anything to prevent him from becoming a purchaser? I think not. The cases which have been cited do not exactly cover the point. I have to see whether in the circumstances of this case there is any reason to suppose that he was using—I will not say his power, for he had none—but any information acquired in 1885 for the purposes of the purchase in 1897. There is a case which I have hit upon which is not exactly in point, but is illustrative of the principle: *Clark* v. *Clark*. (1) There there were executors, one of whom had not proved the will, but had not disclaimed the trusts, and the Court below had held that "until a person appointed executor unmistakably divests himself of that character, or by his solemn act puts it out of his power ever to clothe himself with it, he is as much incapacitated from purchasing from his co-executor as if he had obtained probate." In delivering the judgment of the Privy Council Lord Hobhouse says (2): "Their Lordships cannot agree that a sale is to be avoided, merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased, though in point of fact he never does become such. A man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction, and whether David so acted is one of the questions to be decided. But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others and a purchaser on his own behalf. No such case as that existed, nor was any such charged by the bill."

That I agree is not this case. It was the case of a person who might become a trustee, and this is the case of a person who once was but has long ceased to be a trustee. But, in my opinion, the same principle must apply. The mere fact that a man has once been a trustee, twelve years before the sale, is no reason why he should not purchase the property.

Solicitors: *Russell & Russell; E., F. & H. Landon.*

(1) (1884) 9 App. Cas. 733. (2) 9 App. Cas. 737.

H. C. R.

BUCKLEY J.

1901

Nov. 21, 22; *Dec.* 7.

In re DIXON. PENFOLD *v.* DIXON.

[1901 D. 1321.]

Estate Duty—Incidence—Exercise of General Power of Appointment by Will—Appointed Fund—Residue—Testamentary Expenses—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 6, *sub-s.* 2; *s.* 7, *sub-ss.* 6, 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 22.

Where a general power of appointment over a reversionary interest in a fund expectant upon the determination of a life interest in the testator and of a subsequent life interest in a person who survives him is exercised by will, the corpus of the fund is, under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, property which passes on the testator's death, and estate duty is payable on that corpus under s. 8, sub-s. 4, by the person to whom the property passes for a beneficial interest in possession, or by the trustees in whom the fund is vested. It is not payable by the executors of the will, and is consequently not a testamentary expense. In these circumstances the question whether the fund passed to the "executors as such" within s. 9, sub-s. 1, does not arise.

ORIGINATING SUMMONS.

By the marriage settlement of Mr. and Mrs. J. S. Dixon, dated September 30, 1890, certain securities described as "the husband's fund" were settled upon trust for Mr. Dixon for life, and after his death for Mrs. Dixon for life, and after the death of the survivor upon trust for the children of the marriage, and in the event of failure of children (which happened) for such person or persons and for such purposes as Mr. Dixon should by will or codicil appoint, and in default of appointment for W. T. Penfold Dixon and John Penfold in equal shares.

Mr. Dixon by his will and codicils appointed executors, exercised the power, and appointed that the trustees of the settlement should, after his wife's death, hold the fund in trust for such persons as his wife should by will appoint, and in default of appointment upon trust to transfer the fund to the trustees of his will as part of his residuary personal estate; and he directed payment of his funeral and testamentary expenses and debts out of his general estate.

Mr. Dixon died on July 9, 1900, leaving no issue. His will was duly proved, and his funeral and testamentary expenses and debts had been provided for without having recourse to the husband's fund. A question arose as to the incidence of the estate duty on the husband's fund, and the executors, one of whom was also beneficially interested in the testator's residuary personal estate, took out a summons to determine the question whether it ought to be borne by the fund or by the testator's general residue. Mr. John Penfold, one of the executors, stated in an affidavit that the estate duty secretary at Somerset House had written to the solicitors for all parties a letter of August 14, 1900, in which he said that a claim for estate duty had arisen under the settlement in respect of the husband's fund, and that this might be accounted for by the trustees of the settlement on Form C. 1, or by the executors at the request of the trustees in Account 3 of the Inland Revenue affidavit. The deceased having exercised the power of appointment over the corpus of the fund, subject to his wife's life interest, the value of such reversion should be brought into Account 1 of the affidavit for the purpose of ascertaining the amount of the property in respect of which the grant was to be made; but it should be deducted in the summary on page 7 of the affidavit, a note being attached shewing that estate duty had been paid or would be paid on the principal value of the fund on a Form C. 1, or in Account 3 of the affidavit, as the case might be.

The trustees of the settlement made the return on a Form C. 1, stating the effect of the settlement and of the will and valuing the husband's fund at 13,199*l.* 10*s.* 10*d.* The aggregate of the property passing on the testator's death, including the husband's fund, was over 250,000*l.*; so that estate duty was payable at the rate of 7*l.* per cent., the amount payable on the husband's fund being 924*l.*

Astbury, K.C., and *Buckmaster*, for the executors. The estate duty on the husband's fund must be borne by that fund, not by the testator's residuary estate. Under the Probate Duty Act, 1860, probate duty on an appointed fund was

BUCKLEY J. 1901 DIXON, *In re.* PENFOLD *v.* DIXON.

charged on that fund, and unless there is something to the contrary in the Finance Act of 1894 it will be presumed that the same principle is still in force.

On the true construction of the Act of 1894 the settled fund must pay the duty. By s. 1 duty is payable on everything which passed on the testator's death. Sect. 2 specifies different classes of property which pass. Sub-s. 1 (*a*) refers to the testator's own property; (*b*) to property in which he had a life estate; (*c*) to settled property. This fund comes under s. 2, sub-s. 1 (*b*), and no question arises under s. 9, sub-s. 1, as to whether the property passed to the executor "as such." Then by s. 7, sub-s. 7, the duty has to be paid, not upon the value of the life interest, but upon the capital value of the whole 13,199*l.* 10*s.* 10*d.*; and s. 8, sub-s. 4, says that it shall be paid by the persons beneficially interested in, or by the trustees of, that fund.

If this is property which passes under s. 2, sub-s. 1 (*c*), the settled fund equally has to pay the duty. The executor may pay it under s. 6, sub-s. 2, as on property not under his control, but he can recover it under s. 8, sub-s. 4, from the persons accountable. This is, under s. 22, sub-s. 1 (*j*), an interest in expectancy within s. 7, sub-s. 6. It is not within s. 22, sub-s. 2 (*a*), so as to pass under s. 2, sub-s. 1 (*a*), as property of which the deceased was competent to dispose. It was not the property of the testator, and it must bear its own duty because it was not property which passed to the "executor as such" within s. 9, sub-s. 1. There have been conflicting decisions on this point: *In re Treasure* (1), *In re Moore* (2), and *In re Maddock*. (3) These decisions and the old law on the subject have been reviewed by Byrne J. in *In re Power* (4); and we ask your Lordship on this point to follow that case, and hold that the husband's fund did not come to his executors as such.

The duty is not a testamentary expense which must be borne by the residue. The decision to the contrary in *In re*

(1) [1900] 2 Ch. 648.
(2) [1901] 1 Ch. 691.
(3) W. N. (1901) 118.
(4) [1901] 2 Ch. 659.

Treasure (1), following *In re Clemow* (2), is wrong, and is dissented from in *In re Power*. (3)

H. Terrell, K.C., and *Horace White*, for the persons interested in the settled fund. The estate duty on the fund must be paid by the testator's residuary estate. It was property of which the deceased was at the time of his death competent to dispose within s. 2 (*a*). This is shewn by s. 22, sub-s. 1 (*l*), sub-s. 2 (*a*), and the executor is bound by s. 6, sub-s. 2, to pay the duty. Therefore the fund comes to the "executor as such," and it is not charged with the duty under s. 9, sub-s. 1. The object of s. 9 is only to work out the proportion of duty payable by each person interested. Where there are successive interests the duty is apportioned: s. 6, sub-s. 4; s. 7, sub-s. 6; s. 8, sub-s. 4.

[BUCKLEY J. Duty is payable on the capital, not on the separate interests: ss. 4 and 17.]

It comes back to the question whether this fund passed to the executor as such under s. 9, sub-s. 1, and it is clear that it did. In *In re Power* (3) Byrne J. referred to ancient authorities on the distinction between legal and equitable assets. But they only shew what Court the executor has to apply to; they cannot affect the construction of this Act of Parliament, which draws no such distinction.

[BUCKLEY J. I do not see how an executor gets an appointed fund unless it be as executor. There might be property, such as foreign assets, which he would not get as executor. They do not come to him virtute officii; he has to prove his title abroad.]

Under s. 6, sub-s. 2, and s. 22 every kind of property, including foreign assets, passes to the executor as such. The title he proves abroad is his title as executor.

[BUCKLEY J. *Attorney-General* v. *Hope* (4) and *Attorney-General* v. *Brunning* (5) were relied on by Byrne J. Those cases shew that an executor takes as such everything which the mere production of the probate entitles him to receive. To acquire an appointed fund it is true that he must refer to

(1) [1900] 2 Ch. 648.
(2) [1900] 2 Ch. 182.
(3) [1901] 2 Ch. 659.
(4) (1834) 1 C. M. & R. 530; 37 R. R. 29.
(5) (1860) 8 H. L. C. 243, 265.

BUCKLEY J. 1901 DIXON, *In re.* PENFOLD *v.* DIXON.

the will, but only to shew that the power has been exercised. But the testator does not appoint to the executor. Does not the executor take the fund adversely to, and not under, the beneficial disposition made by the appointment?]

The executor is the only person who can give a discharge for the fund. The exact rule under which he gets for payment of debts a fund appointed to somebody else is stated in *Lord Townshend* v. *Windham.* (1) The moment the power is exercised the fund becomes part of the testator's estate, and forms part of his assets at his death: *Drake* v. *Attorney-General* (2); *Platt* v. *Routh* (3); *In re Cholmondeley* (4); *In re Philbrick's Settlement* (5); *Wilday* v. *Barnett.* (6) The reason of the rule is a presumed intention to benefit his creditors as well as the appointees, because it would be a fraud on his part to benefit the latter and not the former: *In re Wilkinson* (7); *Hayes* v. *Oatley* (8); *In re Hoskin's Trusts.* (9)

The estate duty is a testamentary expense which by the terms of the will the executor is bound to pay.

Buckmaster, in reply. The fact that the testator had a life estate in the fund and died makes duty payable on the whole fund whether there was an appointment or not. If there is no appointment the estate duty clearly falls on the fund. In this case there was an appointment of a reversion subject to the widow's life interest, and that reversion did not pass to the executors as such. It passed to them by virtue of the appointment, not by virtue of their office. The fund does not become the property of the testator, but the appointee is treated as a trustee for the creditors: *Jenney* v. *Andrews.* (10) By exercising the power the testator gave the fund to the executors, but only for the purpose of paying debts. He did not give it to them as executors: *In re Boyd.* (11)

Cur. adv. vult.

(1) (1750) 2 Ves. Sen. 1, 7, 11.
(2) (1843) 10 Cl. & F. 257.
(3) (1841) 3 Beav. 257; 52 R. R. 122.
(4) (1832) 1 C. & M. 149, 170; 38 R. R. 601.
(5) (1865) 34 L. J. (Ch.) 368.
(6) (1868) L. R. 6 Eq. 193.
(7) (1869) L. R. 4 Ch. 587.
(8) (1872) L. R. 14 Eq. 1.
(9) (1877) 6 Ch. D. 281.
(10) (1822) 6 Madd. 264; 23 R. R. 216.
(11) [1897] 2 Ch. 232.

Dec. 7. BUCKLEY J. At the date of his will and of his death John Spofforth Dixon was entitled to a general power of appointment by will over the husband's trust fund, settled by his marriage settlement dated September 30, 1890. In the events which had happened, the fund stood settled upon trust for John Spofforth Dixon for life, and after his death for his wife Alice Mary Dixon for life, and after the death of the survivor for such persons as John Spofforth Dixon should by will appoint. The fund amounts to 13,199*l.* 10*s.* 10*d.*

By his will and codicils John Spofforth Dixon exercised the power, and appointed that the trustees of the settlement should after his wife's death hold the fund in trust for such persons as his wife should by will appoint, and in default of appointment upon trust to transfer the fund to the trustees of his will as part of his residuary estate.

By his will the testator directed payment of his testamentary expenses out of his general estate.

The question to be determined upon this summons is whether the estate duty of 924*l.*, payable in respect of the settled fund (being 7 per cent. upon 13,199*l.* 10*s.* 10*d.*), is to be borne by the husband's trust fund or by the testator's general residue. I am of opinion that it must be borne by the settled fund. To state the grounds for this decision, I must state shortly some of the provisions of the Finance Act, 1894.

Under that Act (s. 1) estate duty is payable on the principal value of all property which passes on a death. Apart from any definitions contained in the Act, it is obvious that this necessarily includes as well property in which the deceased had an absolute interest or an interest not determining with his own life, which necessarily must pass to some one else when he by reason of death can no longer enjoy it, as also property in which the deceased had no interest at all, but which stood limited in such manner as that upon his death it passes from one person to another. With the latter class of property his estate has no concern; but it bears duty none the less.

The definitions contained in the Act expand this obvious view so as to include within "property passing on the death," not only property of the two classes above mentioned, but also

BUCKLEY J. 1901 DIXON, *In re.* PENFOLD *v.* DIXON.

property of which the deceased was at the time of his death competent to dispose. There are in the Act some further definitions of "property passing on the death," but they are not material to this case, and I need not deal with them.

To make that which follows the more intelligible, I will assume a concrete case and suppose a sum of 10,000*l.* Consols held by trustees upon trust for A. for life, and after his death for B. for life, and after his death for C. absolutely. First, suppose that A. dies. Then upon his death his interest will determine, and there will be nothing passing so far as his estate is concerned. But within s. 2, sub-s. 1 (*b*), of the Act the 10,000*l.* Consols will be property passing, and by virtue of s. 7, sub-s. 7, the value of the property so passing is the 10,000*l.* Consols. Upon this sum of 10,000*l.* Consols there will be payable estate duty at a rate to be determined under the scale in s. 17, dependent, that is, upon the principal value of the estate aggregated for this purpose in manner provided by s. 4. This 10,000*l.* Consols does not pass to A.'s executor. His executor has nothing to do with it. All interest of A. in the fund ceased with his death. The persons accountable are, under s. 8, sub-s. 4, either B., as the person to whom the property passes for a beneficial interest in possession, or the trustees in whom the fund is vested. A.'s executor may, if so minded, and if requested by the person so accountable as aforesaid, pay the duty under the latter part of s. 6, sub-s. 2. Whether the persons accountable as above pay the duty or the executor pays the duty, they or he are, under s. 9, sub-ss. 5, 6, entitled to a charge upon the 10,000*l.* Consols for the amount of the duty. The effect of this, of course, is that the corpus of the settled fund bears the duty, and each person interested in succession bears it according to his estate or interest. Secondly, suppose that C. dies. In this case that which passes is a reversionary interest in 10,000*l.* Consols expectant upon the deaths of A. and B. This is property of C., and his executor under the earlier words of s. 6, sub-s. 2, is the person liable to pay the estate duty on delivering the Inland Revenue affidavit. The value for the purposes of the duty is what the reversionary interest would fetch if sold in open

market: s. 7, sub-s. 5. But, thirdly, suppose that A. and C. are the same person, so that the trusts are for A. for life, and after his death for B. for life, and after B.'s death for A. absolutely, and suppose that A. dies. Upon his death the 10,000*l.* Consols is property passing under s. 2, sub-s. 1 (*b*), as in the instance first above given, and the reversionary interest of A. expectant upon B.'s death is property part of A.'s estate passing upon his death within the instance secondly given. The reversionary interest is, within the definition in s. 22, sub-s. 1 (*j*), an "interest in expectancy," and under s. 7, sub-s. 6, estate duty in respect of that interest may be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession.

The case with which I have here to deal is one falling within the instance last, or thirdly, above given, except that A.'s interest in the reversion is by way of general power to appoint the reversion, and not by way of property in the reversion itself.

I turn now to the letter from the Inland Revenue authorities of August 14, 1900, set out in the affidavit of John Penfold, and the forms of account and affidavit there referred to, in order to shew what is the duty of 924*l.* with which I have to deal. The trustees of the settlement of September 30, 1890, upon a Form C 1, returned the property which is included in the settlement at a value of 13,199*l.* 10*s.* 10*d.* The duty in question is 7 per cent. upon that sum. The rate is 7 per cent., because the principal value of the estate aggregated according to s. 4 exceeds 250,000*l.* The Inland Revenue affidavit contains in Account No. 1 two items, of which one is "Personal property over which the deceased had and exercised an absolute power of appointment," and the other is, "The deceased's interest expectant upon the death of A. B. under the will of, &c.," in property. The interest here in question is a power to appoint a reversion so that the interest would fall under a combination of these two heads. To the latter of them is appended at page 4 a marginal note (M) as follows: "M. But where the deceased was entitled to the interest expectant upon

BUCKLEY J. 1901 DIXON, *In re.* PENFOLD *v.* DIXON.

his own death, or upon the death of another person who survives him, and estate duty is payable upon the corpus of the property on the deceased's death, the interest in expectancy is not also chargeable with estate duty on the deceased's death as part of his free estate. Although as it is in fact part of his free estate its value must be looked at for the purposes of the Probate Court. The interest in expectancy should be brought into this affidavit and be taken out again in the summary on page 7."

The summary at page 7, under item VIII., contains the following:—

"VIII. Deduct value of interests in expectancy in property on the corpus whereof estate duty is payable on the deceased's death under the earlier disposition, provided that the property is itself part of the aggregated 'one estate,' but not otherwise. (See note (M) at page 4.)"

The duty, therefore, of 924*l.*, which is here in dispute, is not the duty, and does not include the duty or any part of the duty, in respect of the deceased's interest in the reversionary interest expectant upon his wife's death, but is the duty upon the settled fund of 13,199*l.* 10*s.* 10*d.* This duty is, in my opinion, for the reasons stated in the first instance above given, a duty for which the widow, as tenant for life in possession, or the trustees of the settlement, and not the executor, is the person accountable, and is a duty for which the person who pays it, whether he be the party accountable or the executor, at the request of the party accountable, will be entitled to a charge upon the fund. It follows that, in my opinion, this duty is to be borne by the settled fund, and not by the residue.

For the purpose of what precedes it, it is immaterial that the reversionary interest of the testator was not a reversionary interest in property, but only a general power of appointment of a reversionary interest. If he had been entitled to the reversionary interest itself by way of property and not of power, the same result would have ensued, for the duty in dispute is not that in respect of the reversionary interest, but that in respect of the whole settled fund.

In the view which I take of the case, therefore, the question

does not arise as to the meaning of the words "executor as such" in s. 9, sub-s. 1, and it is unnecessary for me to express any further opinion upon a point on which an unfortunate difference of opinion has arisen. I may add, however, that, having had the advantage of reading the considered judgment of my brother Byrne in *In re Power* (1), I should, if I had to consider that question again, still be of opinion that it lies at the root of the matter to ascertain whether the property included in the power becomes assets for payment of debts under or adversely to the beneficial disposition made by the donee of the power; in other words, whether fictionally the donee of the power is supposed to appoint first to his executor to such extent as is necessary for payment of his debts in a due course of administration, and then to the appointees, or whether the appointment as a beneficial disposition is taken to be what it is upon its face, namely, an appointment to certain appointees, and the executor's right is a right to recover, not as an appointee, but as executor adversely to the appointees by virtue of his right as executor to avoid pro tanto the beneficial disposition of the property which the appointor in fact makes. The latter seems to have been the view taken by Lord Hardwicke in *Lord Townshend* v. *Windham*. (2) Lord Hardwicke, I see, refers to the case in 2 Rolle's Reports, 173, as shewing the origin of the right to treat as general assets for payment of debts property included in a general power exercised by the donee. Further, it would, I think, be necessary to deal with the decision of Lord Romilly in *Hayes* v. *Oatley* (3), which was a decision upon the point on which James L.J.'s words in *In re Hoskin's Trusts* (4) were but dictum. It is, however, unnecessary for me in the present case to reconsider the point.

Being, then, of opinion that this duty is payable out of the settled fund and not out of residue, I ask whether the testator casts it upon residue by the provision in his will for payment of his testamentary expenses out of his general estate? I think not. For if I am right in thinking that the

(1) [1901] 2 Ch. 659.
(2) 2 Ves. Sen. 11.
(3) L. R. 14 Eq. 1.
(4) 6 Ch. D. 281.

BUCKLEY J.
1901
DIXON, *In re.*
PENFOLD *v.* DIXON.

executor is not accountable for this duty and has no concern with it, then the amount is not a testamentary expense.

I hold, therefore, that the 924*l.* must be paid out of the settled fund.

Solicitors: *Merriman, White & Thomson.*

H. C. R.

BUCKLEY J.
1901
Dec. 12.

In re JACKSON'S SETTLED ESTATE.

[1901 J. 1949.]

Vendor and Purchaser—Settled Land—Future Trust for Sale—Trustees for Purposes of Settled Land Acts—Tenant for Life Trustee—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 8—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 16, *sub-s. ii.*

A tenant for life of settled land which is subject to a trust for sale exercisable after his death can be a trustee of the settlement for the purposes of the Settled Land Acts.

Testator gave his wife a life interest in an estate, and appointed her and another trustees of the estate with a trust for sale exercisable after her death:—

Held, that they were trustees for the purposes of the Settled Land Acts.

W. JACKSON, by his will dated June 26, 1886, appointed his wife and F. E. A. Wollaston executors and trustees, and devised to them the Town Thorns estate upon trust to permit his wife to occupy the same during her life, and after her death, in case there should be two or more children of the testator or remoter issue of such children living at her death, or in case there should not be any child or remoter issue of the testator living at her death, then upon the same trusts as were thereinafter declared concerning his residuary real and personal estate; but in case there should be only one child of the testator living at the wife's death, then in trust for that child, his heirs and assigns absolutely. And after bequeathing to his wife his furniture and effects, the testator devised and bequeathed all his real and personal estate, except what he otherwise disposed of by his will, unto and to the use of his said trustees, their heirs, executors, and administrators respectively, upon trust for

sale and conversion in their uncontrolled discretion, and to hold the proceeds upon certain trusts. The testator declared that if his wife married again she was to cease to be trustee of his will, and in that case he appointed T. R. Hargreaves to be a trustee in her place.

The testator died on February 20, 1895, and his will was proved by the widow alone. F. E. A. Wollaston renounced probate and disclaimed the office of trustee, and on April 1, 1898, the widow appointed W. H. Adams to be a trustee in his place. The testator had two children, who were still infants. On March 7, 1901, a notice to treat for the compulsory sale of part of the Town Thorns estate was served on the widow by the London and North Western Railway Company, and on June 29, 1901, a contract for the sale to the company was entered into by her as tenant for life under the Settled Land Acts. The company took the objection that, inasmuch as the trust for sale could only be exercised after the widow's death, she could not be a trustee for the purposes of the Settled Land Acts; and that there were, therefore, not two such trustees.

She accordingly applied by originating summons for the determination of the question whether she and Mr. Adams were trustees of the will for the purposes of the Settled Land Acts, and, if necessary, for the appointment of another trustee in conjunction with W. H. Adams.

The London and North Western Railway Company agreed to come in and be bound by the proceedings, and the summons was amended by adding them as respondents.

W. E. Vernon, for the summons. Mrs. Jackson and Mr. Adams are trustees for the purposes of the Settled Land Acts. It was decided in *Wheelwright* v. *Walker* (1) that s. 2, sub-s. 8, of the Settled Land Act, 1882, which said that trustees with a power of sale should be trustees for the purposes of the Act, did not cover the case of a future power of sale. Therefore the Settled Land Act, 1890, s. 16, sub-s. ii., was passed, which provides that "the persons (if any) who are for the time being under the settlement trustees with future power of sale, or

(1) (1883) 23 Ch. D. 752.

BUCKLEY J. 1901 JACKSON'S SETTLED ESTATE, *In re.*

under a future trust for sale of the land to be sold . . . . whether the power or trust takes effect in all events or not," shall be trustees of the settlement for the purposes of the Settled Land Acts. The fact that Mrs. Jackson is tenant for life is immaterial. There are no reported cases on the point, but decisions have been given in chambers. In *In re Cox and Seadon's Contract*, June 29, 1891, referred to in 91 L. T. Jour. 241, Chitty J. held that a tenant for life in a similar position to the present vendor was a trustee for the purposes of the Settled Land Acts. In *Re Nieuwenhuys*, 1892, mentioned in 37 Sol. J. 109, and 43 Sol. J. 326, his Lordship is said to have given a decision to the contrary.

In *In re Earp*, January 30, 1899, referred to in Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. at p. 423, Stirling J. decided that a trustee with a power of sale exercisable after his own death was a trustee for the purposes of the Settled Land Acts.

A. Underhill, for the London and North Western Railway Company. In the absence of an express provision to that effect, it cannot be supposed that the Legislature intended a person in the position of Mrs. Jackson to be a trustee for the purposes of the Acts. In s. 16, sub-s. ii., the word "under" means "with," or perhaps "bound by." It implies that the trustees shall be competent to exercise the power; and Mrs. Jackson cannot be in that position. The trust does not come into existence till after her death.

The principle of the Acts is that the trustees for the purposes of the Acts are to be persons in whom the settlor has reposed confidence for this purpose. The rights of persons claiming under the settlement are to be carefully preserved: *In re Mundy and Roper's Contract.* (1) The existence of trustees is the only safeguard to the remaindermen, and they must be independent persons. A tenant for life cannot be a trustee for the purposes of the Acts. No doubt the testator might by express words have appointed Mrs. Jackson a trustee for the purposes of the Acts; but he has not done so; and, inasmuch as the will was made before the Act of 1890, no intention to do so can be implied.

(1) [1899] 1 Ch. 275, 289.

The policy of the Acts shews that a tenant for life is not intended to be a trustee. He has to get the consent of the trustees to his cutting timber, s. 35 of the Act of 1882; making improvements, s. 26; selling the mansion-house, s. 10 of the Act of 1890; dealings between him and the estate, s. 12; and differences between him and the trustees are referred to the Court under s. 44 of the Act of 1882. Under this will the tenant for life can act as sole trustee if she survives her co-trustee. By s. 45, sub-s. 2, there must be two trustees to effect a sale; but she might become sole trustee of the proceeds of sale. It is the duty of the trustees to watch and control the tenant for life. Therefore, there are no trustees of this will for the purposes of the Settled Land Acts.

BUCKLEY J. referred to the facts, and continued:—The point to be determined here is one of very general importance. Mrs. Jackson is tenant for life under the will. She and Mr. Adams are trustees of the will. The will contains a trust for sale, but it is a trust for sale which does not take effect until after the decease of Mrs. Jackson—a future trust for sale. Sect. 16, sub-s. ii., of the Settled Land Act, 1890, provides that certain persons shall for the purposes of the Settled Land Act be trustees of the settlement, namely—reading the words relevant here—"The persons (if any) who are for the time being under the settlement trustees under a future trust for sale of the land to be sold." It is argued on the one hand that Mrs. Jackson and Mr. Adams are not such persons, because the trust takes effect only after Mrs. Jackson is dead, so that she can never be a person to carry the trust into effect. It is argued on the other side that, as Mrs. Jackson and Mr. Adams are for the time being trustees of this settlement, and that it contains a future trust for sale, they are therefore trustees for the purposes of the Settled Land Act. I think the latter contention is correct. Take the words of the sub-section. They are these: "The persons (if any) who are for the time being under the settlement trustees." There is no difficulty so far. These two persons are for the time being—that is at present—under the settlement trustees. Then what is meant by "under a future trust for sale"? The preposition "under"

BUCKLEY J. 1901 JACKSON'S SETTLED ESTATE, *In re.*

is a little difficult to construe, but I think it must be read as meaning "subject to" or "bound by" a future trust for sale, or trustees of a settlement "which contains" a future trust for sale. I do not find anything in the words which says that the persons must be those who will execute the trust for sale. It is obvious that such a reading of the sub-section would render it unworkable. Any one of the trustees may die before the future trust for sale becomes exercisable, and in that case he will never exercise it. The age of the trustee may be such, and the date at which the future trust for sale is to take effect may be such, that a particular person in all human probability will not be alive when it comes to be executed. I should be introducing a series of difficulties unless I looked simply at the questions: Who are now the trustees, and does the settlement contain a trust for sale? It appears to me that those are the only two things I have to look at. Now Mr. Underhill, who has argued this case for the London and North Western Railway Company, points out forcibly and truly that the object of having trustees for the purposes of the Settled Land Acts is to check and to control the tenant for life. Ought I to give effect to that to the extent of saying that the tenant for life cannot be a trustee for the purposes of the Settled Land Acts? Plainly not. The testator certainly could have said that his widow and somebody else should be trustees for the purposes of the Settled Land Act. It is a mere question of expediency. Then, also, it is pointed out that Mr. Adams may die, and Mrs. Jackson may be sole surviving trustee and may have to check herself. The answer to that I think is that, if that state of things should arise, it would be necessary and right that there should be appointed some other person to act with her. For instance, under s. 45, sub-s. 2, of the Act of 1882, there must be two trustees at the date when the notice starting the proceedings is given. It would be competent at any time to the remainderman to apply to the Court and shew that the tenant for life was so placed that she ought to be controlled by others who shall act with her. I cannot find anything in that to control the construction of the simple language of sub-s. 2. The decisions on the sub-section have been rather singular

There appear to have been three cases in chambers, none of which were reported; but for such knowledge as we have of them we are indebted to the gentlemen who make communications to the legal newspapers. I find that the late Mr. Justice Chitty, in one case which is referred to, in 1891, *Law Times* newspaper, p. 241, *In re Cox and Seadon's Contract*, apparently decided the point in the same way as I am deciding now. There is no report of the case. It is a paragraph in the newspaper commenting on the conclusions the learned judge is stated to have arrived at. Subsequently, in 1892, it would appear that the same learned judge arrived at a conclusion which is said to be the contrary of his previous decision. I am not sure that that is so. That case is to be found referred to in 37 Sol. J. 109, where it is the subject of a short article, and in 43 Sol. J. 326, where the name of it is given, *Re Nieuwenhuys*, the reference to the record being 1892. N. 1788. The order is set out in 43 Sol. J., and I am not at all clear that that was a decision to the contrary of what the learned judge had previously decided, but there is some doubt about it. The other is a case of *In re Earp*, which was before Stirling J., apparently in chambers, on January 30, 1899. It is stated in Mr. Wolstenholme's book, 8th ed. p. 423, and that learned judge's decision was also in the same direction as I am deciding now. Therefore it appears to me, so far as authority is to be found or traced at all, it is in favour of the view which I take. I hold that, under s. 16, sub-s. ii., of the Act of 1890, the persons who are for the time being trustees of a settlement which contains a future trust for sale are within the definition of that sub-section, and that it is immaterial that some or one of them are persons who in all human probability will not, or in fact cannot, ever exercise the trust, as for instance that one of them is a person who necessarily will be dead before the trust takes effect. I think, therefore, that Mrs. Jackson and Mr. Adams are trustees for the purposes of the Settled Land Acts.

Solicitors: *Ashurst, Morris, Crisp & Co.; C. H. Mason.*

H. C. R.

JOYCE J.
1901
July 31.

AFLALO *v.* LAWRENCE & BULLEN, LIMITED.

[1900 A. 1714.]

Copyright—Book—Author and Publisher—Encyclopædia—Ownership of Copyright in Contributions—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 18.

The plaintiff A. was employed by the defendants, a firm of publishers, to edit an encyclopædia on sport, and it was a term of the agreement that he was to be remunerated for his editorial services by a lump sum for which he was to contribute certain articles without further fee. The plaintiff C. was also employed by the defendants to contribute certain articles to the encyclopædia at so much per thousand words:—

Held, that there were no special circumstances either in the nature of the publication or in the terms of the employment to warrant the inference that the copyright in the articles contributed by the plaintiffs was to belong to the publishers, and an injunction was granted to restrain the defendants from publishing those articles in a separate form.

THIS was an action for infringement of copyright.

In the spring of 1896 the plaintiff F. G. Aflalo submitted to the defendants, who were a firm of publishers in London, a scheme for the compilation and publication of a work to be called "The Encyclopædia of Sport," and to consist of signed articles by well-known writers on various branches of sport. The defendants determined to publish the work under the editorship of Mr. Aflalo, and by an agreement in writing of July 10, 1896, they agreed to bear all the cost of publication, and to pay Mr. Aflalo a fee of 500*l.* for his editorial services; and Mr. Aflalo agreed to write without further fee 7000 words of the special articles, and to contribute all the unsigned articles that might be required. The agreement also provided that Mr. Aflalo should be entitled to pursue his literary work in so far as it did not interfere with the performance of his editorial duties, and that, in the event of the defendants desiring to discontinue publishing the encyclopædia before the work had proceeded to a certain stage as therein mentioned, the sum of 250*l.* should be paid to Mr. Aflalo subject to the condition that the stoppage of the work was not to be caused by his own action. The encyclopædia was published in a series of parts, and was ultimately completed under the part editorship of

Mr. Aflalo in 1899. In pursuance of the above agreement, Mr. Aflalo contributed to the encyclopædia a signed article entitled "Sea Fishing." Shortly before the date of this agreement, namely, on June 2, 1896, Mr. Aflalo, at the request of the defendants, wrote a letter to the plaintiff Mr. C. H. Cook, who under the pseudonym of John Bickerdyke was a well-known writer on angling, inviting him to contribute to the forthcoming encyclopædia an article on angling of 5000 words, and separate articles of 5000 words each on trout and pike, to be paid for at the rate of 2*l.* per thousand at the times therein mentioned, and in pursuance of this agreement Mr. Cook contributed three articles entitled respectively "Coarse Fish," "Pike," and "Trout." The plaintiffs were respectively registered as proprietors of the copyrights in the four above-mentioned articles. All the articles were published in the encyclopædia. In 1900 the defendants, without the knowledge or consent of the plaintiffs, published a book called "The Young Sportsman," containing copies of each of these articles. As soon as this came to the knowledge of the plaintiffs, they called upon the defendants to discontinue the further sale and publication of the book, and to compensate them for the infringements of their copyrights, and upon the refusal of the defendants to do so they brought this action for an injunction and damages.

The defendants by their defence alleged that it was an implied term of the plaintiffs' employment that the copyrights in the articles in question should belong to the defendants as proprietors of the encyclopædia, and they counter-claimed for a declaration to that effect, and for an order expunging from the book of registry the entries whereby the plaintiffs had registered themselves as proprietors of the copyrights in those articles.

Hughes, K.C., and *R. J. Parker*, for the plaintiffs. In the absence of special contract, express or implied, an author who writes articles for an encyclopædia is entitled to the copyright in his work, and the publisher is not entitled to use it in a separate form. The question turns upon ss. 3 and 18 of the Copyright Act, 1842. Under that Act primâ facie the copy-

JOYCE J. 1901 AFLALO v. LAWRENCE & BULLEN, LIMITED.

right is in the author; but where an author is employed by a publisher to write articles for an encyclopædia, or other work published in a series of parts, and the articles are composed under such employment on the terms that the copyright shall belong to the publisher, then the copyright is to be the property of the publisher as if he were the actual author. There is here no express contract as to copyright, and the question is, Can it be inferred from the facts of this case that the articles were composed on the terms that the publisher should have the copyright therein? *Bishop of Hereford* v. *Griffin* (1), which is the only authority upon encyclopædias, is a decision in favour of the author, and it covers this case. In the case of an encyclopædia each article is a monograph of great value in itself, and that distinguishes it from cases in which the contributions have no separate value, such, for example, as *Sweet* v. *Benning* (2), which related to the ownership of the copyright in a report published for the *Jurist*. If that case meant to decide that the employment of itself necessarily involved that the copyright was in the publisher, it would amount to a repeal of s. 18; but when fairly read it does not go that length. In *Walter* v. *Howe* (3), where the subject-matter was a memoir of the late Earl of Beaconsfield written for *The Times*, the decision was in favour of the author. *Lamb* v. *Evans* (4) illustrates the principle on which the Court acts. That case establishes that the onus is on the publisher to prove that the copyright is in him, but that in determining this question the nature of the work to be done may be taken into consideration. There the question was as to the copyright in a series of headings in a directory of advertisements, and it would be an absurdity to say that the persons employed to compose the headings, which had no separate value whatever, should have the copyright in them. There is nothing in the circumstances of this case to discharge the onus which is upon the publishers.

Younger, *K.C.*, and *T. L. Gilmour*, for the defendants. The true inference to be drawn from the terms of the employment is that the literary matter supplied by the plaintiffs to the

(1) (1848) 16 Sim. 190.
(2) (1855) 16 C. B. 459.
(3) (1881) 17 Ch. D. 708.
(4) [1893] 1 Ch. 218.

defendants was to be used by the defendants in any event whatever, and that the book, and every part of it, was to be the defendants' property. The transaction must be looked at from a business point of view. According to the plaintiffs' contention, it would be open to the author on the very next day after the original publication of his article to republish it in a separate form, and so deprive the original publisher, his employer, of the benefit for which he had paid. That this will not be permitted is shewn both by *Sweet* v. *Benning* (1) and *Lamb* v. *Evans*. (2)

The cases relied on by the plaintiffs are distinguishable. *Bishop of Hereford* v. *Griffin* (3) was really a decision upon a point of pleading, there being there no allegation in the defence which met the plaintiffs' case. In *Walter* v. *Howe* (4) the author was not a party, and there was no evidence as to the terms of employment, and *Sweet* v. *Benning* (1) was not there cited; and, further, it was a decision upon motion. It does not in any way qualify the principle of *Sweet* v. *Benning* (1) and *Lamb* v. *Evans*. (2)

JOYCE J. (after reading s. 18 of the Copyright Act, 1842). It is perfectly true that in some cases, where the publication has been of a peculiar nature, or where there have been special circumstances in the nature or terms of the employment of the person who was engaged to compose part of the book in question, it has been held by the Court not to be necessary that it should be expressly provided in the agreement between the publisher and the author that the ownership of the copyright was to belong to the publisher. But it can be inferred from the special circumstances of the case that that was to be so.

Now, in the present case, there is no special fact or circumstance whatever in the nature of the publication. It is simply an encyclopædia of an ordinary kind—an encyclopædia such as is mentioned in the Act of Parliament. Nor as to Mr. Cook, at all events, can I find that there is any term or circumstance in the mode in which he was employed by Messrs. Lawrence & Bullen, the publishers, from which you can infer that

(1) 16 C. B. 459.
(2) [1893] 1 Ch. 218.
(3) 16 Sim. 190.
(4) 17 Ch. D. 708.

JOYCE J. 1901 AFLALO v. LAWRENCE & BULLEN, LIMITED.

anything was to result, or that any consequence was to ensue different from what would have been in an ordinary case. In other words, as to Mr. Cook there is no special circumstance in the nature of the work or of the employment which leads me to say that the decisions to which I have been referred shew that one of the terms of his employment was that the copyright in that which he wrote should belong to the publisher. With regard to Mr. Aflalo, is there anything in the terms upon which he was employed? I think if there be anything special in the terms upon which he was employed, the speciality is rather in his favour. He is to be paid so much for anything written for "The Encyclopædia of Sport," and in addition to the editing he is to write, without further fee, 7000 words of the special articles, and to contribute the unsigned articles. That, to my mind, if there is any materiality in it at all—and I do not think there is not—tends rather to the conclusion that the copyright was not to belong to the publisher.

But, however, I decide this case on the short ground that I see no special circumstances either in the nature of the work or in the terms or nature of the employment from which I must infer that which is not expressed—namely, that the copyright is to belong to the publishers. The result is that I hold the copyright in the articles composed by Mr. Cook and Mr. Aflalo not to belong to the proprietors within s. 18 of the Act.

What the consequence of that may be upon the question whether Messrs. Cook and Aflalo can republish their articles in any way it is not for me to determine. It does not arise. All I have to decide here is whether Messrs. Lawrence & Bullen are entitled to republish the articles written by Mr. Cook and Mr. Aflalo in the manner in which they have been doing, or threatening to do, and which, in my opinion, they are not entitled to do unless they are the proprietors of the copyright. I think the plaintiffs are entitled to the order which they ask, namely, an injunction, and an inquiry as to damages.

Solicitors: *Field, Roscoe & Co.; Dixon, Elkin & Dixon.*

H. B. H.

JOYCE J.
1901
June 12, 13, 14; *Nov.* 19.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* MAYOR OF THE CITY OF WESTMINSTER.

[1901 L. 260.]

Public Health—Sanitary Authority—Power to provide Sanitary Conveniences—Subway Approaches—Subsoil of Road—Vesting in Sanitary Authority—Owner of Property adjoining Road—Property in Subsoil ad medium filum—Presumption—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

By the Public Health (London) Act, 1891, s. 44, sanitary authorities have power to provide public conveniences in situations where they deem the same to be required, and for this purpose the subsoil of any road, exclusive of the footway, is vested in the sanitary authority.

Where a sanitary authority had constructed in the middle of a street an underground convenience, with underground approaches having entrances at either side of the street:—

Held, that, the primary object being the construction of the convenience with the requisite means of approach thereto, the fact that the approaches might be used for the purpose of crossing the street independently of the convenience did not constitute the works a subway which the authority had no power to make.

Shortly before the construction of the works the footway had been increased in width. One of the entrances was constructed partly in the subsoil of the road and partly in that of the footway as so increased:—

Held, that inasmuch as by presumption of law the subsoil of the road ad medium filum viæ belonged to the owner of the adjoining premises, and the vesting of the subsoil in the sanitary authority for the purpose of making the convenience did not extend to the footway, the works in so far as they encroached upon the footway as it existed at the commencement of the works constituted a trespass; and in an action by the adjoining owner a mandatory injunction was granted for their removal.

ACTION.

The plaintiffs were the owners and occupiers of certain land and premises in Parliament Street and Bridge Street, Westminster. This property was conveyed to them in fee simple by an indenture dated July 26, 1886, the description of the parcels so conveyed being as follows:—

"All those freehold messuages or tenements situate in Parliament Street, in the parish of St. Margaret, Westminster, in the county of Middlesex, and numbered 34, 35, and 36 in

JOYCE J. 1901 LONDON AND NORTH WESTERN RAILWAY v. WEST-MINSTER CORPORATION.

Parliament Street aforesaid, and also all those two freehold messuages or tenements situate in Bridge Street, in the said parish of St. Margaret's, Westminster, numbered respectively 11 and 12 in Bridge Street aforesaid, but which were formerly numbered 46 and 47 in the same street, all which said premises are more particularly delineated on the plan drawn in the margin of these presents and thereon coloured red."

The property comprised a block of buildings at the north-east corner formed by the junction of Parliament Street and Bridge Street.

The houses in Parliament Street had vaults or cellars in connection with them which extended beyond the boundary line, as shewn upon the plan, under the pavement of the footway, and for some little distance into the roadway as it then existed. At the date of the conveyance the footway was about 12 feet wide from the wall of the houses to the outer edge of the pavement. Between 1887 and 1890 the plaintiffs rebuilt the premises. They occupied a portion of the new building in Parliament Street as offices, and let the remainder to different tenants.

In 1899 Parliament Street was widened by pulling down the houses on the western side and throwing a portion of the sites into the roadway, the width of the footway in front of the plaintiffs' premises being at the same time increased from 12 feet to about 21 feet.

In 1900 the defendants, who were the highway and sanitary authority of the district, acting under the powers conferred by s. 44 of the Public Health (London) Act, 1891, constructed underneath the middle of Parliament Street certain public lavatories and conveniences with approaches thereto by means of subways from either side of the street, the entrance to these subways being by means of staircases placed at or near the edge of the pavement. One of these staircases was placed opposite to the doorway of the plaintiffs' premises. It extended for a distance of 33 feet along the footway, and was fenced off from it and from the roadway by an iron railing. It was constructed chiefly in the roadway; but to the extent of 2 ft. 9 in. it encroached upon the footway as it existed after

the widening of the street. The wall of the staircase nearest to the plaintiffs' premises was built up close to the wall of the plaintiffs' vault. The railing on the pavement was placed upon stone slabs which to the extent of a few inches were vertically over the wall of the plaintiffs' vaults.

The plaintiffs objected to the works constructed by the defendants on various grounds. They alleged that the defendants had no power under the Act of 1891 to construct a subway; and that inasmuch as the subsoil of the road was vested in the plaintiffs ad medium filum viæ the making of the subway constituted a trespass upon their property; and that even if for the purpose of making the conveniences the subsoil of the roadway was vested in the defendants and not in the plaintiffs, the subsoil of the footway was not so vested, and that to the extent to which the staircase was constructed in the footway it was a trespass; and, further, that the erection of a portion of the staircase over the wall of the plaintiffs' vaults constituted a trespass. The plaintiffs also alleged that by erecting the staircase and railing opposite to the entrance to their premises the defendants had obstructed the highway to the particular damage of the plaintiffs by obstructing and interfering with the access of the plaintiffs from their said premises to the highway. On these grounds they claimed (1.) an injunction restraining the defendants from continuing to trespass by permitting the subway staircase and railings to remain upon the plaintiffs' land; (2.) alternatively, an injunction to restrain the continued obstruction of the highway; and (3.) damages.

Younger, K.C., and *M. Shearman*, for the plaintiffs. The defendants justify what they have done as being in exercise of their powers under the Public Health (London) Act, 1891. It is submitted that they have exceeded their powers under that Act. First, what they have constructed is not a public sanitary convenience within the Act at all. It is a subway, and none the less a subway because, owing to the way in which it has been constructed, it can be utilised as a means of access to a convenience. It is really a crossing for foot-passengers, with conveniences communicating therewith. The conveniences

JOYCE J. 1901 LONDON AND NORTH WESTERN RAILWAY v. WEST-MINSTER CORPORATION.

are distinct in themselves and cut off from the subway. Secondly, if it be a convenience, it encroaches upon the footway, and is therefore outside the Act. The defendants have placed the entrance and railings partly upon what was footway before the commencement of the works. In 1899 the footway, which had before been 12 feet wide, was widened to 21 feet. That was done by the defendants under their powers as the highway authority under ss. 90, 96, and 98 of the Metropolis Management Act, 1855, and s. 19 of the Highway Act, 1835. It cannot be that, for the purposes of s. 44 of the Act of 1891, they can treat as roadway any part of that which has become footway. They have no power to decrease the footway except bonâ fide for the purpose of increasing the roadway. The object of the exception of the footway from s. 44 was to protect the frontagers.

[*Hughes, K.C.* Sect. 141 defines the footway.]

It means the footway which existed at the inception of the work. The defendants cannot revert to what has been footway in the past.

[JOYCE J. Footway is defined in s. 72 of the Highway Act.]

Yes, it is that which has been "set apart for the accommodation of foot-passengers." The plaintiffs' right to complain is based first upon the right of property, and secondly upon the ground of public nuisance causing particular damage to the plaintiffs. Further, we say that, assuming this to be a public sanitary convenience, the construction of the entrance upon the footway immediately opposite the door of the plaintiffs' premises constitutes an unreasonable exercise by the defendants of their powers, and, there being an indirect motive on the part of the defendants, namely, the provision of facilities for pedestrian traffic, the Court will restrain them. *Vernon* v. *St. James' Vestry* (1) shews that the Court will control local authorities in the exercise of their powers otherwise than bonâ fide. This is not a bonâ fide exercise by the defendants of their powers, because they could well have made the convenience without the subway, and without injuring the plain-

(1) (1880) 16 Ch. D. 449.

tiffs. The plaintiffs are also entitled to relief on the ground of trespass. In the first place, the defendants have trespassed by placing a portion of the structure over the wall of our vaults. Again, under the conveyance of 1886, by presumption of law the subsoil of the highway to the middle of the road passed to the plaintiffs: Pratt on Highways, 14th ed. 39. It was supposed formerly that that presumption did not necessarily extend to streets in a town; but that distinction was swept away by Romer J. in *In re White's Charities*. (1)

The presumption is not rebutted by the fact that according to the plan upon the conveyance the property in the soil of the road does not appear to be included: *Micklethwait* v. *Newlay Bridge Co.* (2) Apart from the Act of 1891, the defendants have no interest in the subsoil of the street. What is vested in them is merely the surface and so much of the subjacent stratum as may be necessary for them to discharge their duties as a street authority: *Coverdale* v. *Charlton* (3), *Tonbridge Wells Corporation* v. *Baird*. (4) Highway authorities get merely statutory possession of streets which vest in them; they do not get the fee: Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 90, 96. The latter section is practically identical with s. 149 of the Public Health Act, 1875.

The subsoil is vested in the defendants by s. 44 of the Act of 1891 for the purpose of making a sanitary convenience, and no other. Assuming that we are wrong as to property, then we claim to succeed on the ground of nuisance occasioning particular damage to us.

The particular damage alleged is the obstruction of the plaintiffs' access to the highway, and the permanent depreciation in the value of their premises. This is something more than a public nuisance occasioning particular damage: the defendants are interfering with the plaintiffs' private right of access to the highway, a right upon which the law looks with approval: *Fritz* v. *Hobson* (5); *Lyon* v. *Fishmongers' Co.* (6)

(1) [1898] 1 Ch. 659.
(2) (1886) 33 Ch. D. 133, 145.
(3) (1878) 4 Q. B. D. 104.
(4) [1896] A. C. 434.
(5) (1880) 14 Ch. D. 542.
(6) (1876) 1 App. Cas. 662.

JOYCE J.
1901
LONDON AND NORTH WESTERN RAILWAY v. WESTMINSTER CORPORATION.

That the Court will grant an injunction in such a case is shewn by *Goodson* v. *Richardson*. (1)

Hughes, *K.C.*, and *Dighton Pollock*, for the defendants. Apart from their statutory powers, no doubt what has been done by the defendants would constitute an obstruction to the highway, and in that sense a public nuisance; but if what they have done is within their powers under s. 44 of the Act of 1891, then the obstruction is authorized.

The most substantial point is whether the defendants have power to do what they have done, supposing the whole of the works to have been constructed in the roadway. The question as to the trespass upon the wall of the vault is unimportant. The other question of trespass upon the soil of the footway is also unimportant so far as the plaintiffs are concerned, because, if the defendants should be held to have exceeded their powers as to that, they could move the entrance further into the roadway to the extent of 2 ft. 9 in., which would not benefit the plaintiffs at all, as the staircase and railings would still obstruct the entrance to their premises. If, having regard to s. 44, they cannot object to the entrance in the middle of the road, neither can they do so if it be put at the side of the road. It would be a sanitary convenience placed in a situation where it was "deemed to be required." It is not suggested that the defendants have not deemed the convenience to be required where they have placed it. In order to succeed, the plaintiffs must establish that this is a mere device in order to construct a subway. The fact that there is a subway in connection with the convenience does not make it any the less a convenience. It is in truth a sanitary convenience in the middle of the street with underground access from the footway on both sides. It has been found that if the entrance to such a convenience is made in the middle of the street its usefulness is much reduced. The question is one of the bonâ fide exercise of the defendants' powers.

There is evidence that the matter was fully considered, and that the sanitary authority, in the exercise of its discretion, came to the conclusion that the scheme was the best that

(1) (1874) L. R. 9 Ch. 221.

could be adopted. The question of what it is necessary to shew in the case of the exercise by a local authority of its discretion was discussed in *Chaplin & Co.* v. *Westminster Corporation*. (1) That case is in many ways analogous to the present. Buckley J. there points out the distinction between the private right of access to the highway from adjoining premises, and the public right to use the highway. Here the defendants do not interfere with the plaintiffs' private right of access to the highway. It is the interference with the public right which they must rely on: see also *Attorney-General* v. *Thames Conservators* (2), *Baker* v. *St. Marylebone Vestry* (3), and *Biddulph* v. *St. George's Vestry*. (4)

With regard to the alleged trespass on the vault. What is complained of is a railing which to a small extent is vertically over the wall of the vault. The surface of the street is vested in the defendants under s. 96 of the Act of 1855; and s. 108 expressly gives power to place fences and rails for the purposes of safety, so that, if the staircase is properly where it is, the defendants had power to fence it off. Assuming we are wrong as to that, all that we have done is to place a small quantity of bricks and mortar on the plaintiffs' property and it becomes theirs: *Mayfair Property Co.* v. *Johnston*. (5) The proper remedy in such a case is damages.

The other point, as to the footway, is more material. No doubt the entrance is placed to the extent of 2 ft. 9 in. upon a spot which prior to 1899 was not footway, but for a time afterwards was footway, and now since this work has been done is no longer footway. It is for the highway authority from time to time to determine how much of the highway is to be footway: Highway Act, 1835, s. 19. The defendants acting under their powers as the highway authority have narrowed the footway. This approach to the convenience is outside the present footway, and the space where it is made is part of the subsoil of the road, which is vested in the defendants.

(1) [1901] 2 Ch. 329.
(2) (1862) 1 H. & M. 1.
(3) (1876) 24 W. R. 848.
(4) (1863) 3 D. J. & S. 493.
(5) [1894] 1 Ch. 508.

JOYCE J.
1901
LONDON AND NORTH WESTERN RAILWAY v. WESTMINSTER CORPORATION.

If the defendants are justified in placing the approach to the convenience in the roadway, then the plaintiffs are not materially damaged by its being placed to the extent of 2 ft. 9 in. upon the footway—that is to say, they have not sustained that particular damage which is necessary to enable them to sue in respect of a public nuisance.

[They also referred to *Harrison* v. *Southwark and Vauxhall Water Co.* (1)]

Younger, K.C., in reply. It is admitted that apart from the Act of 1891 the subsoil of the street is vested in the plaintiffs, so that the whole question is one of trespass, and all questions of particular damage may be left out of consideration. On the main point we say that these works are a convenience plus a subway, and we object to the making of this subway, which is unauthorized by the Act, on land which is our property. The making of the subway is altogether ultra vires. On the question of the footway, the subsoil of the street is only vested in the sanitary authority by s. 44 for the purpose of providing certain things which they may elect to provide. That vesting takes effect only when they elect to exercise the power; and that is subject to this, that the soil of the footway, as it then exists, shall not vest in them. The plaintiffs are entitled to the injunction they ask for.

Cur. adv. vult.

Nov. 19. JOYCE J. In the year 1886 the London and North Western Railway Company, the plaintiffs in this action, purchased certain freehold property situate at the corner of Parliament Street and Bridge Street, Westminster, which was described in the conveyance by reference to a plan and thereon coloured red. [His Lordship referred to the conveyance and plan, and continued:—] This plan appears to me to comprise not merely the site of the buildings then on the premises, but also a small area outside, being a portion of the foot pavement in Parliament Street. The pavement of that portion is said to have stood originally a few inches above the pavement of the general footway, but this difference of level has since been

(1) [1891] 2 Ch. 409.

removed. I consider it highly improbable that either party supposed any interest in the soil of the adjacent footway, outside the area coloured red on the plan, or the moiety of Parliament Street as then existing, to be the subject of the sale or of the conveyance. But as a matter of fact, there were in connection with the premises certain vaults underneath the footway and projecting into Parliament Street beyond the boundary line of the premises as shewn upon the plan. At the date of the conveyance, and thenceforward until certain alterations made by the then local authority and completed in June, 1899, the pavement for pedestrian traffic in front of the plaintiffs' premises in Parliament Street was of the width of no more than 12 feet or thereabouts, measured from the front wall of the plaintiffs' buildings. In the year 1899, upon the removal of the block of buildings between Parliament Street, as it then was, and King Street, and the consequent widening of Parliament Street, the kerb of the footway in front of the plaintiff's premises was advanced into the roadway so as to make the width of the footway about 21 feet, and the edge of this footway was the line of the kerbing before the alterations in question in this action. Parliament Street as widened is nearly 100 feet in breadth.

At the corner where the plaintiffs' premises are situate, between Parliament Street and Bridge Street leading to Westminster Bridge, there is very considerable traffic of all kinds, as everybody knows, and it was at one time contemplated by the local authority to construct, there or thereabouts, certain sanitary conveniences and a general system of subways underground, so as to enable foot-passengers thereby to cross the streets in safety. For some reason or other this project for a general system of subways had to be given up; but it was finally decided to construct extensive sanitary conveniences for the use of both sexes respectively underneath the middle of Parliament Street, with approaches thereto by a descending staircase from the footways on either side, one effect of this being, of course, that if any one chose to descend from the foot pavement, pass underneath the street, using or not using one of the conveniences in passing, he or she might

JOYCE J. 1901 LONDON AND NORTH WESTERN RAILWAY v. WEST-MINSTER CORPORATION.

cross the street without danger of being run over by any of the vehicles which there at certain hours crowd the roadway. At first it was proposed to place the descending stairs, from the eastern side of Parliament Street to these conveniences, upon or within the outer portion of the foot pavement, widened as it was in 1899 opposite the plaintiffs' premises; but it was found that this could not be done without acquiring or interfering with a small portion of the vaults I have mentioned belonging to the plaintiffs. They objecting to these stairs being in front of their premises, though at a distance of 15 feet or thereabouts from the front of their buildings, the stairs were placed further away, so as to stand for a portion of their width on the roadway as then existing, and for the rest, namely—2 ft. 9 in. or thereabouts—upon the foot pavement as extended in the previous year, 1899, in the manner I have mentioned. At the time of the trial the works were nearly completed, what I may call the general line of the kerb on the edge of the foot pavement having been put back so as to be distant about 19 feet or a little less from the adjacent buildings. It is not alleged or suggested that this has not left more than ample width for the use of foot-passengers there. Indeed, I suppose the footway was widened as it was in 1899 not so much from necessity as to improve the appearance of the street.

It was stated, and is probably the fact, that the only power the defendants had to do what they have done must be found in s. 44 of the Public Health (London) Act, 1891, and it was argued that, apart from any question of the right of property in the subsoil, the situation selected for the conveniences was unreasonable and improper, and that, inasmuch as people could cross Parliament Street by means of the approaches to the conveniences, those approaches did in fact constitute a subway which the defendants had no authority to make, and that all that they have done is thus ultra vires and ought to be removed. Apart from any question depending upon the legal right to the subsoil, or assuming this to be vested in the defendants, I have come to the conclusion that what the defendants have done is in no way ultra vires, unreasonable, or improper. Their primary object was, in my opinion, the construction of the conveniences

with the requisite and proper means of approach thereto and exit therefrom, and because, by reason of there being approaches from both sides, these may be used for crossing the street, I decline to hold that the defendants have not acted bonâ fide in the exercise of their statutory powers, or that they have occasioned any nuisance that was not authorized by law. In other words, I think this action fails, unless the plaintiffs can establish that a portion of the site of the eastern approach or staircase down to the conveniences is their property, and a part of the footway within the meaning of that expression in the 44th section of the Public Health (London) Act, 1891. The plaintiffs relied upon the presumption which is thus stated in Pratt on Highways, 14th ed. p. 39: "It is a presumption of the law, in the absence of evidence to the contrary, that the soil of a highway, to the middle of the road (usque ad medium filum viæ) belongs to the owner of the land adjoining the highway. This presumption has been said to rest on the supposition that, when the road was originally set out, the proprietors of the adjoining land each contributed a portion of their land for its formation." And the presumption is also stated in Elphinstone, Norton and Clark on the Interpretation of Deeds, at p. 179, as follows: "By the conveyance of land abutting on a highway, or separated from it by a strip of unenclosed land, the primâ facie presumption of law, in the absence of evidence of ownership, is that the strip and the soil of the road usque ad medium filum passes." The defendants hardly contested the application of this presumption to the present case, notwithstanding what is said in *Beckett* v. *Leeds Corporation* (1), Romer J. having held in *In re White's Charities* (2) that the presumption that half the soil of the road is intended to pass to a purchaser of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country. I cannot say that I consider this last case to be an altogether satisfactory authority. Still it is a deliberate decision to the effect above stated.

In considering my judgment it occurred to me that Parliament Street was quite a modern street, and that it was

(1) (1872) L. R. 7 Ch. 421. (2) [1898] 1 Ch. 659.

JOYCE J. 1901 LONDON AND NORTH WESTERN RAILWAY v. WEST-MINSTER CORPORATION.

very possible that the land required for making it might have been purchased by some road authority. Upon referring to Wheatley's "London," I found it there stated that Parliament Street was made pursuant to the statute 29 Geo. 2, c. 38, King Street having been previously the only highway from Whitehall to Westminster. That Act provided the Commissioners of Westminster Bridge with funds for the purchase of houses and grounds for the purpose of widening the ways and making more safe and commodious the streets, avenues, and passages from Charing Cross to Westminster. In J. T. Smith's "Antiquities of Westminster" (1807) an elaborate plan is given, shewing the streets, courts, alleys, and yards near the locus in quo as they appeared before the erection of Parliament Street. If this plan be correct, the site of the portion of Parliament Street now in question must have been purchased, or the right to use it somehow acquired —it is hardly likely to have been given—by the Commissioners of Westminster Bridge. I thought it my duty under the circumstances to mention the case again in Court and to call counsel's attention to the point. Upon a subsequent day, however, counsel for the defendants informed me that he had nothing more to say, and that his clients did not desire or were unable to adduce further evidence. I may add that by the Act 16 & 17 Vict. c. 46, the estates of the Commissioners of Westminster Bridge were transferred to the Commissioners of Her Majesty's Works and Public Buildings. The Act 50 & 51 Vict. c. 34, also deals with the approaches to Westminster Bridge.

Now, whatever I may conjecture to be the true facts if investigated and ascertained in reference to the ownership of the subsoil in Parliament Street where the staircase has been constructed, I suppose I must act upon such evidence only as was before the Court at the trial, and hold that the presumption I have mentioned applies, and consequently that the land or soil where the staircase is constructed as to 2 ft. 9 in. in width is the property of the plaintiffs, and, being part of the footway, not liable to be taken and used by the defendants under the Act of 1891 for the purpose of the construction of sanitary con-

veniences. I must, therefore, as it seems to me, grant an injunction for the removal of this portion of the staircase.

This result appears, under the circumstances, to be most unsatisfactory. I cannot help suspecting that the soil in question does not belong to the plaintiffs. My order will do the plaintiffs no real good if the defendants choose, as they may, simply to put the staircase 2 ft. 9 in. further out into the roadway, thus making it to stand clear of the footway as it was before the works were commenced. Nor do I see how I can compel the defendants to restore the old line of the kerb or edge of the footway as it existed at the end of 1899.

As to the costs, it appears to me that the plaintiffs have failed in substance as to half the case, and they have succeeded as to the rest. Therefore, I make no order as to costs.

I shall stay the operation of this injunction for a period of six months, and I shall give leave to apply to the judge in chambers to extend that period if an appeal be presented, or for any other reason, and if it comes before me, certainly if an appeal is presented, I shall stay it until after the appeal is disposed of.

Solicitors: *C. H. Mason; Percy Gates.*

G. A. S.

JOYCE J. 1901 Dec. 18, 19.

In re A POLICY No. 6402 OF THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY.

[1901 S. 2802.]

Policy of Insurance—Policy made Payable to Another—Purchase in Name of a Stranger—Presumption of Intention—Resulting Trust.

A policy of insurance was taken out by A. on his own life "for behoof of B.," his wife's sister, and the policy provided that B., her executors, administrators, and assigns, should be entitled to receive the policy moneys on A.'s death. A., who survived B., retained the policy, and paid the premiums till his death :—

Held, that the legal personal representatives of B. were trustees of the policy moneys for the legal personal representatives of A.

On March 11, 1850, Mr. William Sanderson effected a policy on his own life for 400*l.* with the Scottish Equitable Life Assurance Society "for behoof of Miss Harriott Stiles," and it was thereby certified that the said Harriott Stiles, and her executors, administrators, and assigns, should be entitled to receive at the end of six months after the decease of the said William Sanderson the sum of 400*l.*, or such other sum as should become payable upon the contingency before expressed, agreeably to the laws and regulations of the said society; and it was thereby specifically declared and agreed that the sum or sums to become due and payable as therein mentioned should be payable to the executors, administrators, or assigns of the said assured at the office of the society in London, and that the receipt of the person or persons who in the character of executor or executors, or administrator or administrators, would by the law of England have been competent to have given a discharge for the said sum or sums, if the said policy had been a policy issued by a society or company established in England, should be a valid or sufficient discharge to the society for the said sum or sums, notwithstanding that the said policy was a policy issued by a society established in Scotland.

Mr. Sanderson's wife died in the same year, 1850, and in May, 1852, Mr. Sanderson went through the ceremony of marriage with Miss Stiles, who was his deceased wife's sister.

Miss Stiles died on September 21, 1870, and Mr. Sanderson on September 22, 1900.

There was then due under the policy the sum of 790*l.* 17*s.* 4*d.* Doubts having arisen as to who was entitled to this sum, the insurance company paid the money into court under the Life Assurance Companies (Payment into Court) Act, 1896.

This summons was taken out by the executors of Mr. Sanderson for the determination of the question whether the money belonged to them, or to the legal personal representative of Miss Stiles.

It appeared that Mr. Sanderson had always retained the policy in his own possession, and had regularly paid the premiums thereon until his death. There was no evidence to shew that the policy was taken out for the benefit of Miss Stiles.

George Lawrence, for the plaintiffs. There is no evidence apart from the language of the policy itself that this policy was taken out for the benefit of Miss Stiles, and the mere fact that the policy was expressed to be taken out for her behoof, and that she was named as the person entitled to receive the money is not sufficient to entitle her to the beneficial interest therein. It may be admitted that the defendant as her legal personal representative had the legal right to receive the money, but he is a trustee of it for the plaintiffs. There is no authority upon the precise point. In *In re Richardson* (1), where a policy was taken out by a father in his daughter's name and was retained by the father, it was held by Kay J. that the daughter was beneficially entitled to the policy moneys: but that decision was founded upon the presumption of advancement arising from the relationship of the parties. In *Pfleger* v. *Browne* (2) it was laid down by Lord Romilly that, where a policy is taken out by A. and is made payable to B., the onus is on the latter to prove that he is beneficially entitled to it. This case depends upon the principle stated by Kindersley V.-C. in *Beecher* v. *Major* (3), which was a case of

(1) (1882) 47 L. T. 514. (2) (1860) 28 Beav. 391.
(3) (1865) 2 Dr. & Sm. 431, 435.

JOYCE J.
1901
A POLICY No. 6402 OF THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY, *In re.*

a purchase of stock in the name of a stranger. The Vice-Chancellor there said: "The question is one of intention, and, in the absence of an expressed intention, the Courts have established certain presumptions as guides in ascertaining the intention. One presumption is that if a person purchases stock in the name of A. B. not being his child, the stock belongs beneficially to the person who purchased and transferred the stock." The Vice-Chancellor then goes on to say that the presumption may be rebutted by a declaration of intention that it should be for the benefit of A. B., but that such intention must be clearly expressed.

Pattisson, for the defendant. Here there is a precise declaration that the policy is for behoof of Miss Stiles, and the policy is made payable to her. That is enough to constitute a gift of the policy moneys. Sanderson has done everything which, according to the nature of the property, was necessary to be done in order to transfer it to Miss Stiles. The language of the policy amounts to a good declaration of trust in her favour: *Milroy* v. *Lord.* (1)

George Lawrence, in reply. Although this policy may be void on the ground of no insurable interest as between Sanderson and the insurance company, yet, if the company does not take advantage of the illegality, the rights of the parties are determined in the same way as if it were a valid policy: *Worthington* v. *Curtis.* (2)

[JOYCE J. referred to *Mortimer* v. *Davies*, cited by Sir Samuel Romilly in *Rider* v. *Kidder.* (3)]

Cur. adv. vult.

Dec. 19. JOYCE J. In the leading case of *Dyer* v. *Dyer* (4) Eyre C.B., in giving his judgment, says: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in

(1) (1862) 4 D. F. & J. 264, 274.
(2) (1875) 1 Ch. D. 419.
(3) (1805) 10 Ves. 360, 363; 53 R. R. 269.
(4) (1788) 2 Cox, 92, 93; 1 Watk. Copy. 216; 2 R. R. 14.

one name or several; whether jointly or *successivè*, results to the man who advanced the purchase-money"; and, although the judgment goes only to real estate or to leaseholds, I think the law is correctly laid down in Lewin on Trusts, 10th ed. p. 175, where it is stated: "Not only real estate, but personalty also, is governed by these principles, as if a man take a bond, or purchase an annuity, stock, or other chattel interest, in the name of a stranger, the equitable ownership results to the person from whom the consideration moved."

The authority cited with reference to a bond is the case of *Ebrand* v. *Dancer* (1), where a grandfather had taken a bond in the name of his grandchildren, their father being dead. The Lord Chancellor said: "There is difference in the case, where the father is dead and where he is alive; for when the father is dead, the grandchildren are in the immediate care of the grandfather; and if he take bonds in their names, or make leases to them, it shall not be judged trusts, but provision for the grandchild, unless it be otherwise declared at the same time." In other words, that means that, if the grandfather in that case had not been in loco parentis to the grandchildren in whose name the bond had been taken out, then they would have been trustees for the grandfather, who took the bond.

Then there is the case of *Rider* v. *Kidder*. (2) There John Rider purchased Consolidated 3 per cent. Annuities, and transferred the stock into the joint names of himself and the defendant Anne Kidder; and Sir Samuel Romilly, in his argument in that case, cites *Mortimer* v. *Davies*, and says (3): "In *Mortimer* v. *Davies*, a late case at the Rolls a man living in this way, but not married, purchased an annuity in the name of the woman, with whom he cohabited. It appeared the purchase-money was his; and no consideration passed from her. She insisted, that it was intended as a provision for her; but was held to be a trustee." That case is again mentioned by Sir Samuel Romilly in his reply. He says (4): "In *Mortimer* v. *Davies* there were no circumstances.

(1) (1680) 2 Ch. Cas. 26.
(2) 10 Ves. 360; 53 R. R. 269.
(3) 10 Ves. 363.
(4) Ibid. 365.

JOYCE J. 1901 A POLICY No. 6402 OF THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY, *In re.*

Upon the dry point alone, that the defendant cannot produce evidence of an intention to make a provision for her, this plaintiff is entitled"; and it appears that in this particular case of *Rider* v. *Kidder* (1) the annuities were directed to be retransferred. Lord Eldon says (2): "If the case at the Rolls was purely this; that A. bought an annuity in the name of B., A. paying for it, and B. had no proof, that it was meant as a provision for her, in this Court the fact of the advancement of the purchase-money, as between these persons, standing in no relation to each other, that would meet the presumption, raises a trust in the person, vested with the interest, for the benefit of the person, who paid the money"; and later on he says: "If therefore this case depended upon the mere naked circumstance of the purchase of stock in both their names, and he had died immediately, without any dealing or transaction upon it, I should have thought, the defendant would have been a trustee for his personal representative; as she would have been for himself." And Lord Romilly puts it quite generally in the case of *Garrick* v. *Taylor* (3), which was affirmed in the Court of Appeal. (4) He says: "If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child."

Now, in the present case a policy was taken out by Mr. Sanderson a great many years ago, and the name of Miss Stiles appears in the policy as the person to whom the money is to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid, and were paid for many years after her death, by Sanderson. That, really, is a case of a man taking the policy out in the name of another, that other person being a sister of his wife, and, therefore, not standing in any relation to him "that would meet the presumption," as Lord Eldon expressed it. It comes really to this: a purchase by one in the name of another with no other circumstances at all proved. Therefore, in my opinion,

(1) 10 Ves. 360; (1806) 12 Ves. 202; 53 R. R. 269.
(2) 10 Ves. 366.
(3) (1860) 29 Beav. 79, 83.
(4) (1861) 31 L. J. (Ch.) 68.

JOYCE J.
1901
A POLICY No. 6402 OF THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY. *In re.*

although the legal personal representative of the lady in this case would be the person entitled to receive the money at law and to give a receipt for it, in equity the money belongs to the legal personal representatives of Mr. Sanderson, who took out the policy.

Solicitors: *Sole, Turner & Knight, for Palmer, Wardley & Barton, Tonbridge.*

H. B. H.

C. A.
1901
Dec. 19.

McCHEANE *v.* GYLES.

[1901 M. 1004.]

Procedure—Action for Breach of Trust—Relief claimed by Defendant—Contribution—Third-party Notice—Third Party out of Jurisdiction—"Necessary or Proper Party"—Service out of Jurisdiction—Service in Ireland—Application for Leave—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Supreme Court*, 1883, *Order* XI., *rr.* 1 (*g*), 2; *Order* XVI., *rr.* 11, 48.

The third-party procedure, which is the creature of the Judicature Act, 1873, s. 24, sub-s. 3, is governed, as regards service out of the jurisdiction of a third-party notice issued by a defendant under Rules of the Supreme Court, 1883, Order XVI., r. 48, by Order XI., r. 1; so that a defendant can only obtain leave to serve such a notice on a third party out of the jurisdiction when the subject-matter of his claim falls under one or other of the specific cases mentioned in Order XI., r. 1, in which service of a writ out of the jurisdiction will be allowed.

Thus where, in an action by a cestui que trust against the survivor of two trustees for breach of trust, the defendant applied under Order XI., r. 1 (*g*), for leave to serve the legal personal representative, resident in Ireland, of the deceased trustee, as being "a necessary or proper party" to the action, with a third-party notice issued under Order XVI., r. 48, and claiming contribution:—

Held, by the Court of Appeal, that Order XI., r. 1 (*g*), had no application to a third-party notice for contribution (unless, *semble*, there were at least two contributors one of whom was within the jurisdiction); and that contribution from a single contributor was not one of the cases mentioned in that order in which service of a writ out of the jurisdiction could be allowed. An order made by Buckley J., giving the defendant leave to serve his notice on the third party in Ireland, was therefore discharged, but without prejudice to any application by him under Order XVI., r. 11, to add the third party as a defendant to the action.

THOMAS JONES, of Kilkenny in Ireland, by his will, dated March 21, 1862, bequeathed 1000*l.* to three trustees therein

C. A. 1901 McCheane v. Gyles.

named, in trust for his daughter Sarah for life; and in case she married it was his wish that the said sum should be vested in trustees for her benefit during her life, and after her death for the benefit of her issue. And he appointed his son Thomas Jones his executor.

The testator died on October 19, 1863, and his will was duly proved by his executor in the Kilkenny District Registry of the Court of Probate in Ireland.

By articles executed in Ireland and dated August 12, 1865, to which Thomas Jones, the son, was a party, and made on the marriage of his daughter Sarah with Thomas Shaw McCheane, both of whom were also parties, it was agreed that as soon as the said Thomas Jones, the son, or any future personal representative of the testator, should realize out of the assets of the testator the sum of 1000*l.*, the same should be paid to two persons as trustees, who should stand possessed thereof upon trust to pay the interest thereof to the wife for life, and after her death upon trust for her issue as she should by deed or will appoint, with remainders over.

These articles were followed by a settlement dated December 17, 1874, made and executed in Ireland by Mr. and Mrs. McCheane, whereby Walter Gyles and John Cronyn were appointed trustees of the 1000*l.*, which was therein expressed to have been duly paid to them by the testator's then legal personal representative, upon the trusts of the will as varied by the articles, the two trustees being parties to the settlement and expressing their consent to act. Mrs. McCheane by a deed-poll of March 26, 1901, in pursuance of her power, appointed the whole trust fund to her only son, Thomas Ernest McCheane, absolutely, at the same time assigning her life interest therein to him absolutely. Mr. and Mrs. McCheane, their son, and the two trustees were all resident in Ireland. The 1000*l.* trust fund was invested by the two trustees Gyles and Cronyn on a second mortgage of land in Ireland, dated December 17, 1874, the same date as the settlement, the mortgage being, it was said, a contributory mortgage.

In 1896 the mortgaged property was sold, but realized a sum sufficient to pay only the first mortgage, so that the 1000*l.* trust fund was lost.

John Cronyn, one of the two trustees of the settlement, died on June 22, 1877, and administration to his estate was granted to his widow and executrix, Caroline Eliza Cronyn, who was resident in Dublin. It was said that under his will she was tenant for life of his estate.

In March, 1901, Thomas Ernest McCheane, being the sole beneficiary under the settlement, brought the present action in England against Gyles, the surviving trustee, who happened then to be in England, charging him with breach of trust in having advanced the trust fund upon an insufficient and improper security, and claiming payment by him of the entire fund, with interest.

The defendant Gyles then took out a summons ex parte asking either that Mrs. Cronyn, the executrix of his deceased co-trustee, might be added as a defendant to the action, or that he might have leave to serve her in Dublin, out of the jurisdiction, with a third-party notice, claiming contribution from her, as her deceased husband's legal personal representative, to the extent of one-half of any sum the plaintiff might recover in the action, on the ground that her husband was at the date of the advance, and thereafter up to the date of his death, trustee of the settlement together with the defendant and a party to the advance, and equally liable with the defendant in respect of the alleged breach of trust.

On the hearing of the summons in chambers the judge made an order giving the defendant Gyles leave to serve the third-party notice in Dublin on Mrs. Cronyn, and she was eventually served there.

Mrs. Cronyn then, on September 4, 1901, entered a conditional appearance, and subsequently served the defendant Gyles with a notice of motion dated November 11, 1901, to have the third-party notice and the order giving leave to serve it out of the jurisdiction set aside or discharged.

The motion was supported by an affidavit by Mrs. Cronyn stating that she permanently resided and was domiciled in Ireland: that the testator Thomas Jones was resident in Ireland: that the marriage articles were executed in Ireland, and the parties thereto were resident and domiciled in Ireland,

C. A. 1901 McCheane v. Gyles.

and the mortgage of December 17, 1874, was executed in Ireland and affected Irish property only: that the necessary witnesses in the action were all resident in Ireland: also that she had long since administered the estate of her deceased husband without having had any notice of the claim put forward in the action. She also alleged that Mrs. McCheane, the tenant for life, had consented to and acquiesced in the investment; and she submitted that neither Mrs. McCheane, as tenant for life under the articles and settlement, nor the plaintiff as her assignee, could during her life maintain the present cause of action. She further stated that at the date of the mortgage of 1874 the mortgaged property was believed to be ample security for the trust fund, and that the loss was entirely due to the subsequent depreciation of land in Ireland.

Upon the hearing of the motion by Buckley J. on November 22, 1901, he refused it with costs.

Mrs. Cronyn appealed.

Butcher, K.C., and *Lavington*, for Mrs. Cronyn. Under Rules of the Supreme Court, Order XVI., r. 48 (1), the service of a third-party notice by a defendant is to be regulated by the rules relating to the service of a writ of summons, and therefore, in order to see in what cases a writ of summons may be served out of the jurisdiction, it is necessary to refer to Order XI., r. 1. (1)

(1) The following orders and rules were referred to in the course of the argument:—

Order XI., r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—

"(*a*) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or

"(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

"(*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

"(*d*) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or

"(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms

If, then, a defendant is not in a position himself to serve a writ out of the jurisdiction, he has no power to serve a third-party notice out of the jurisdiction. In the present case, supposing the defendant Gyles had been made liable in this

thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

"(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Order XI., r. 2: "Where leave is asked from the Court or a judge to serve a writ, under the last preceding rule, in Scotland or in Ireland, if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, . . ."

Order XVI., r. 11: "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

Order XVI., r. 48: "Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (hereinafter called the third-party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence. . . ."

C. A. 1901 McCheane v. Gyles.

action to pay the 1000*l.*, and had then sought to obtain contribution from Mrs. Cronyn, he could not have issued a writ against her for that purpose out of the jurisdiction, for a writ for contribution is not one of the cases provided for by Order XI., r. 1. She could not be sued out of the jurisdiction merely because her late husband's co-trustee happened to be within the jurisdiction. If, therefore, Gyles could not have issued a writ for contribution against a person out of the jurisdiction, it follows that he could have no power to serve a third-party notice out of the jurisdiction for the same object. But, even assuming that under the rules for service out of the jurisdiction the third-party notice could be served, this is not a case in which the Court would, in the exercise of its discretion, allow such service. This case ought to be treated in the same way as if an action were sought to be brought against Mrs. Cronyn. There is good reason why the plaintiff did not sue the legal personal representative of a trustee who died in 1877, and whose estate has long since been administered; and the delay would be equally fatal to any action by the defendant against the representative of his deceased co-trustee. With regard to Order XI., r. 1, sub-clause (*g*) is the only provision in the rule which can be suggested as covering the present case. But, when examined, that sub-clause applies only to a case where a person out of the jurisdiction is a necessary or proper party to an action brought "against some other person duly served within the jurisdiction"; that is, where the claim is against two persons, one being out of the jurisdiction and the other being duly served within the jurisdiction. Now in the present case the defendant Gyles is not seeking to sue two persons, one without and the other within the jurisdiction: he is seeking to sue one person only, and that is a person who is out of the jurisdiction. He cannot, as a defendant, be in a better position than an ordinary plaintiff under that sub-clause. Moreover, Mrs. Cronyn is not a "necessary or proper party" to the present action. The cause of action as between the plaintiff and Mrs. Cronyn is entirely different from that as between the plaintiff and Gyles. Mrs. Cronyn may have numerous defences, and, as the question relates to Irish land, their validity ought to be

decided according to Irish law. A trustee sued in England cannot serve a third-party notice upon a co-trustee in Ireland.

On the question of allowing service of a writ out of the jurisdiction the Court has a discretion. Here an Irishman, party to an Irish contract, relating to Irish land, comes over to England: why, because that Irishman is being sued here, should it follow that this Irish lady, resident and domiciled in Ireland, must necessarily be under the same liability to be sued here, and in the same action? The scheme of the rules as to third-party procedure is to make the proceeding against the third party an independent proceeding in which the defendant is to be the actor: *In re Salmon.* (1) The words "necessary or proper party" in sub-clause (*g*) do not mean any party who may collaterally be brought into the action for certain purposes within the rules of the Judicature Act, but a person who is a necessary or proper party against whom the action is brought; in fact, the sub-clause is not applicable to third-party notices at all, nor to a third party domiciled or resident in Scotland or Ireland: *Speller & Co.* v. *Bristol Steam Navigation Co.* (2), a case which was approved of in *Dubout & Co.* v. *Macpherson.* (3) *Dickson* v. *Law & Davidson* (4) was a different case to the present. There the so-called "third party" was not really a third party at all, for he was made a co-defendant to the action. *Swansea Shipping Co.* v. *Duncan, Fox & Co.* (5) was also a different case to the present, and has no application, for it was not a decision that the whole of the sub-clauses of Order XI., r. 1, applied to a third-party notice: in fact, sub-clause (*g*) was not there considered at all, and, as was said in *Dubout & Co.* v. *Macpherson* (6), *Speller's Case* (2) in no way conflicts with the *Swansea Shipping Case.* (5) Accordingly, there is no jurisdiction here to give leave to issue a writ out of the jurisdiction, and therefore to give leave to serve this third-party notice.

[Romer L.J. Rule 2 of Order XI. seems to have some application. Under that rule, upon an application for leave to

(1) (1889) 42 Ch. D. 351, 363.
(2) (1884) 13 Q. B. D. 96, 98, 99.
(3) (1889) 23 Q. B. D. 340.
(4) [1895] 2 Ch. 62.
(5) (1876) 1 Q. B. D. 644.
(6) 23 Q. B. D. 341.

C. A. 1901 McCheane v. Gyles.

serve a writ in Scotland or Ireland, if the Court finds there is a concurrent remedy there, the Court is to have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant, or person sought to be served.]

The Court has a discretion in the matter, and the balance of convenience is certainly in favour of allowing the defendant Gyles to assert any remedy he may have against Mrs. Cronyn, not here, but in Ireland, where he has "a concurrent remedy," and where Mrs. Cronyn resides. This case differs from *Harvey* v. *Dougherty* (1), for there the persons directly liable to the plaintiff, a residuary legatee, namely, the executors of his testatrix, were all living; whereas here it is sought to sue the administratrix of a trustee who died in 1877, and whose estate has been fully administered; and a complete remedy cannot be got here. Moreover, in that case, although Kay J. refused to discharge an order which had been made giving leave for service of the writ on the two executors who were resident out of the jurisdiction, he did so with considerable hesitation.

[Cozens-Hardy L.J. That case shews, if a decision were wanted, that the Court has a discretion in the matter.]

Order xi. is exhaustive, and the Court, in considering whether it should grant leave to serve a writ out of the jurisdiction, cannot go beyond the express provision of that order.

Astbury, K.C., and *Austen-Cartmell*, for the defendant Gyles. The question of granting leave for service out of the jurisdiction being one of judicial discretion, we submit that the discretion exercised by the learned judge below should not be interfered with. If the other side is right in its contention, no third-party notice can be served out of the jurisdiction in a case where it is important that it should be served; as, for instance, where a person is a "necessary or proper party" to be before the Court for the complete decision of all questions in the action. It is an injustice to prevent a plaintiff from having the question in the action adjudicated upon between persons who are equally liable to himself. Now, the legal personal

(1) (1887) 56 L. T. 322.

representative of a trustee is clearly "a necessary or proper party," within Order XI., r. 1 (*g*), to an action for breach of trust, in order that all questions relating to the subject-matter of the action may be decided. He may possibly have a defence; but that is not the question when considering whether or not he is a necessary or proper party.

Suppose the question is tried with Mrs. Cronyn as a third party, inasmuch as she is tenant for life under her husband's will, a defence of plene administravit would be unavailing, because she has assets in her possession. For this purpose there is no necessity for taking separate proceedings in Ireland. If she had had assets in her possession and had distributed them among other persons, she would have been a necessary and proper party to proceedings for following the estate of her testator into the hands of those other persons. The question is, What is "a necessary or proper party" under sub-clause (*g*)? The opinion expressed by Huddleston B. in *Speller & Co.* v. *Bristol Steam Navigation Co.* (1), that sub-clause (*g*) is not applicable to third-party notices, is a mere dictum. We submit that under that sub-clause, where a person out of the jurisdiction is a "necessary" party, or where he is a "proper" party, to an action, then a writ may be served upon him out of the jurisdiction.

Order XVI., r. 48, says that where a defendant claims contribution or indemnity over against a person not a party to the action, he may, by leave, issue a third-party notice and serve it in accordance with the rules for service of writs of summons; and under rule 11 of the same order the Court may in any cause or matter direct the joinder of any party whose presence before the Court is necessary to enable it effectually and completely to adjudicate upon and settle all questions involved.

[ROMER L.J. But a third party is brought in, not because the plaintiff wants to sue the third party, but because the defendant wants to sue him.]

Where a plaintiff is suing a person who is liable jointly and severally with another, and can only sue the one, then, under

(1) 13 Q. B. D. 96, 99.

C. A. 1901 McCheane v. Gyles.

Order XVI., r. 48, the Court can, where the defendant who is sued claims contribution against that other person, give the defendant leave to issue a third-party notice, which is to be served according to the rules regulating the service of a writ. No doubt, in such a case, when considering the question of service, you must remember you are dealing with a third-party notice and not with a writ; but the real question is, Can the defendant serve a third-party notice when the plaintiff finds there are two persons liable to him, but the circumstances are such that he can only sue one of them? We submit that he can, and that the contention that a defendant cannot issue a third-party notice where he could not have issued a writ is wrong.

[Romer L.J. Suppose the plaintiff here were to get judgment against the defendant, how could the defendant get contribution as against a person who is out of the jurisdiction?

Vaughan Williams L.J. On the part of Mrs. Cronyn it is said, "True, the defendant may, under Order XVI., r. 48, serve a third-party notice on a stranger; but he can only do so in a case in which, if he were a plaintiff, he could have proceeded by writ to be served out of the jurisdiction; this, however, is not a case in which the defendant could have proceeded by writ served out of the jurisdiction." That is the point you have to meet.

Romer L.J. You must shew that if the third-party notice were an original proceeding, it is one which you could serve on the third party out of the jurisdiction.]

The effect of the argument on behalf of the appellant is that in no case in which there is a claim for contribution or indemnity based on an express or implied contract, or upon equitable principles, can a third-party notice be served out of the jurisdiction.

[Vaughan Williams L.J. Sect. 24, sub-s. 3, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), seems to support your view, for under that sub-section, which deals with the subject of third parties, the Court may grant to a defendant in respect of any equitable estate or right, or other matter of equity, and so on, "all such relief relating to or connected with the

original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose."]

Looking at the spirit and intention of the section of the Act, we submit that sub-clause (*g*) should be read as including any case resting upon express or implied contract or upon equitable principles. Mrs. Cronyn might have been joined as a defendant under the first part of the summons taken out by the defendant Gyles; and as that defendant is charged with breach of trust, he has the right, on equitable principles, to have the legal personal representative of his deceased co-trustee brought before the Court. In *Speller's Case* (1) there was no right of contribution or indemnity at all against the third party, and therefore the initial condition required by rule 48 of Order XVI. had not been complied with, and there was no right whatever to serve the third party.

Dubout & Co. v. *Macpherson* (2) and the *Swansea Shipping Case* (3) were not decisions upon sub-clause (*g*), but on sub-clause (*e*), as to an action relating to a contract to be performed within the jurisdiction.

VAUGHAN WILLIAMS L.J. The question we have to decide on this appeal is whether or not the case is one in which the order for service of the third-party notice out of the jurisdiction ought to have been made. Now, I have no doubt myself that that order, having regard to the orders and rules which have been framed under the Judicature Act, is an order which should not have been made. I am sorry to say so, because, speaking for myself, I cannot help thinking that, having regard to the terms of the Judicature Act, there really was no reason why the orders and rules should not have been framed differently. In other words, the terms of the Act are such that the rules might

(1) 13 Q. B. D. 96. (2) 23 Q. B. D. 340.
(3) 1 Q. B. D. 644.

C. A. 1901 McCHEANE v. GYLES. Vaughan Williams L.J.

have been framed to cover such a case as this; and I think that, looking at the spirit of the Judicature Act, whenever there was a cause or matter instituted in the High Court, if there were matters connected with and arising out of that cause or matter which could and conveniently might be determined in the original proceeding, then the Act meant that the Courts should have the power, and that it should be their duty, to include those matters in the original action. I cannot help thinking myself that the whole third-party procedure is the creature of the Judicature Act, 1873, and in particular of s. 24. Sect. 24 begins thus: "In every civil cause or matter commenced in the High Court law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following." Then it proceeds to deal with the rights of a plaintiff or defendant, sub-s. 1 dealing with rights to be given to a plaintiff, and then sub-ss. 2 and 3 with rights to be given to a defendant. Speaking for myself, I am inclined to think that the intention of the Judicature Act was to make all these matters which are provided for in the sub-sections of s. 24 incidental parts of the original action: and under these circumstances I should have thought that the spirit of the Act might very well have been carried out by making the original action, that is, the subject-matter of it, the test as to whether notice of the writ should be served out of the jurisdiction, under Order XI., r. 1, or as to whether notice should issue against a third party as provided for by rule 48 of Order XVI. But, however much I may think that might have been within the spirit of the Judicature Act, I am quite clear that, as the rules stand, the service of a third-party notice out of the jurisdiction can only be properly sanctioned when the subject-matter of the claim of the defendant, covered by the third-party notice, is of such a character that, if the claim had been the subject of an independent action commenced by writ in the ordinary way, an order for service out of the jurisdiction could properly have been made in accordance with the provisions of Order XI., r. 1.

There has been such a long discussion of this case that it is unnecessary for me to go through the lettered clauses of rule 1. It is enough for me to say that it has not been seriously

contended that the third-party notice covers any claim against the third party coming within any of these lettered clauses except clause (*g*); and all that clause (*g*) deals with really is service of a writ in a case in which "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Now, in the present case it may very well be that Mrs. Cronyn is "a necessary or proper party" to an action brought by the plaintiff; but that is not the question. If you had here a third-party notice properly served upon a person within the jurisdiction, then in all probability you might have a third-party notice served on some one who is outside the jurisdiction; but, in my judgment, there is not the slightest pretence for saying that clause (*g*) has any application at all to the third-party notice in this case. It is a third-party notice in the nature of an action which the defendant proposes to bring against the third party.

I am of opinion that the appeal should be allowed, and the order of the Court below discharged.

Romer L.J. I agree that this appeal must be allowed. To my mind the case is a simple one, depending upon a few of the Rules of Court. In the first place I will point out that we are not concerned here with any application by the plaintiff under Order xvi., r. 11, for adding Mrs. Cronyn as a defendant to the action and serving her with the writ out of the jurisdiction under Order xi., r. 1 (*g*). We could not decide any such application on the present occasion, for the simple reason that the plaintiff is not here, and we could not make any order adding a defendant without hearing the plaintiff. It seems that the summons did, in the first instance, ask in the alternative that Mrs. Cronyn should be added as a defendant; and so far as that goes, I think that it should still be open to the defendant to see if he can make anything of such an application; but that is a question which must go back to the judge for him to consider. We are then reduced to the simple question whether we can make an order for service of the third-party notice out of the jurisdiction. That depends upon rule 48

C. A. 1901 McCheane v. Gyles. Romer L.J.

of Order XVI., which provides that "where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (hereinafter called the third-party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons." That includes the rules applicable to the service of writs out of the jurisdiction. Having once arrived at that point, what we have to consider in this case is, "Is this third-party notice, were it in form a writ of summons, capable of being served out of the jurisdiction upon a third party?" In considering that question one must have regard to the parties, that is, not to the claim of the plaintiff in the action, but to the claim of the defendant against the third party. You must treat the claim of the defendant against the third party as if it were a claim on a writ of summons, and see if that claim comes within the rules as to the service of writs out of the jurisdiction, that is, within Order XI., r. 1. If it does, then leave can be given for the service; if not, leave cannot be given. In my opinion, it is plain here that there is no case for giving leave, because the case cannot be brought within any one of the provisions of Order XI., r. 1. For the purpose of considering whether service of a third-party notice out of the jurisdiction should be allowed, you have nothing to do with the subject-matter of the claim in the action itself: you can only look at the nature of the claim made by the notice and the position of the person who is sought to be served. The rules are really plain, and the matter is, in my opinion, free from doubt.

Cozens-Hardy L.J. I agree. I will only add this—that, in my opinion, the Judicature Act, 1873, s. 24, sub-s. 3, supports the view taken by Vaughan Williams L.J., that the third-party procedure was created by the Judicature Act. Sub-s. 3 of s. 24 provides that the Court may grant to a defendant "all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any

other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose." The Act, therefore, treats the third-party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party.

Then, in the rules, which have the force of statutory authority, we find provisions on the subject of service out of the jurisdiction. Those are in Order XI., r. 1, and on reading those provisions we find that what we have to consider is, what is the proper procedure supposing a defendant has instituted a cause against a third party "for the like purpose," that is, for the same object as that of the third-party notice. If that is so, then it is clear that in the present case the order for service out of the jurisdiction ought to be discharged, for an action for contribution is not mentioned in Order XI., r. 1, at all.

I say nothing with regard to adding Mrs. Cronyn as a defendant under Order XVI., r. 11, as that question is not now before us. No doubt the judge may in certain cases have a discretion to add a defendant even in the absence of the plaintiff, but such a discretion can only be exercised under very special circumstances. At present, we have not to deal with any question of that kind.

VAUGHAN WILLIAMS L.J. The appeal is allowed with costs, and the order of the Court below will be discharged. The matter will go back to the judge without prejudice to any application, under the first part of the summons, to join Mrs. Cronyn as a defendant, the Court not expressing any opinion upon that part of the summons.

Solicitors: *Wansey, Bowen & Co., for J. A. French, Dublin; Bircham & Co.*

G. I. F. C.

C. A. 1901 Dec. 2, 3, 20.

HOME AND COLONIAL STORES, LIMITED *v.* COLLS.

[1900 H. 2797.]

Ancient Lights—Prescription—"Substantial" Interference—Damage—Measure of Right—Angle of 45 degrees—Mandatory Injunction—Inquiry as to Damage, Refusal of.

There is no rule of law that ancient lights may be interfered with by a building provided it leaves them an angle of 45 degrees of light; but in judging of the probable effect of a proposed building upon ancient lights the Court may not unreasonably regard the fact that an angle of 45 degrees will be left as primâ facie evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence.

Vaughan Williams L.J. doubted whether, as the law now stands, the supposed 45 degrees rule can now be regarded even as a rough measure of the rights of the owner or occupier of ancient lights.

The principles upon which the Court will grant an injunction against actual or threatened interference with ancient lights stated.

A mandatory injunction was granted by the Court of Appeal, ordering the defendant to pull down so much of his new building (completed since the judgment of the Court below) as interfered with the ancient lights, as theretofore enjoyed, of business premises of which the plaintiffs were lessees and occupiers; it being proved that the interference with the ancient lights by the new building was "substantial," and also caused "real damage" (*Warren* v. *Brown*, [1902] 1 K. B. 15) to the plaintiffs.

The Court refused to direct an inquiry and report by a surveyor as to the injury caused by the defendant's new building in its completed state.

Decision of Joyce J. reversed.

THE plaintiffs were the occupiers of a large corner block of premises situate on the north side of Worship Street and the east side of Paul Street, in the City of London, held by them for a term of years of which about seventeen years were unexpired. The windows in the Worship Street front of the block were all ancient lights. The defendant was the owner of No. 44, Worship Street, on the south side of that street, and immediately opposite that part of the plaintiffs' premises furthest from Paul Street. The defendant had recently pulled down an old building that had stood upon the site of No. 44, that old building having been 36 ft. wide along the front and 19 ft. 6 in. high. The buildings on each side of No. 44, to

the east and west, were 33 ft. high, or 13 ft. 6 in. higher than the old building. Worship Street itself was 41 ft. wide. The defendant proposed to erect on No. 44 a building which would, when completed, be 36 ft. wide and 42 ft. high from the street level.

The ground-floor of the plaintiffs' premises consisted of a large room or office about 12 ft. high and extending back from the Worship Street front to a depth of about 50 ft. This room was occupied by some ninety clerks, who sat at desks arranged there for the purposes of the business. The only windows lighting it were in the Worship Street front. There were five of these windows in a row, all of large dimensions, being 10 ft. high and 6 ft. wide, and the sill of each was 3 ft. from the street level. The defendant's proposed new building, though it threatened to affect the whole of the plaintiffs' ancient lights, would, it was said, most seriously affect two of them in particular, namely, the two ground-floor windows numbered 4 and 5 from the corner of Paul Street. The ground-floor room was fitted with electric light, there being five rows of lamps near the ceiling. Through the absence of windows except at the front the back part of the room had always required the electric light except on very bright days.

As the defendant had commenced and was proceeding with his new building the plaintiffs, on August 17, 1900, issued the writ in this action, claiming an injunction to restrain him from erecting on the site of No. 44, Worship Street any building or erection so as to darken, injure, or obstruct any of the plaintiffs' ancient lights as the same had been enjoyed previously to the taking down of the defendant's old building; and for damages. On August 20, 1900, the plaintiffs served the defendant with notice of motion for an interim injunction in the same terms.

Upon the motion coming on for hearing on October 26, 1900, it being admitted that the case was one to be tried on vivâ voce evidence, it was ordered that the action should immediately be set down in the list of witness actions for trial, without pleadings. The action was accordingly set

C. A. 1901 HOME AND COLONIAL STORES, LIMITED v. COLLS.

down for trial, and was eventually tried before Joyce J. on December 19 and 20, 1900. The only question seriously argued was as to the amount of obstruction to the plaintiffs' two ground-floor windows, numbered 4 and 5 from Paul Street, these windows being directly opposite No. 44, Worship Street. Several London architects and surveyors were called on both sides. A scale plan of the plaintiffs' premises and of the defendant's proposed new building was put in. From this plan, and also from a model produced, it appeared that the angle of incidence of light over the highest part of the defendant's proposed new building to the sill of each of the two windows in question would be at least 45 degrees from the perpendicular above the point of incidence. The defendant's witnesses admitted that there would be some, though they said not a material, diminution of light, but they expressed the opinion that the angle of 45 degrees would leave the plaintiffs a sufficient amount of light for all practical purposes. One of the defendant's expert witnesses further expressed the opinion that the defendant's new building would not cause any damage to the plaintiffs' property, and would not in the least affect its letting or selling value. On the other hand, the plaintiffs' witnesses stated that the light would be substantially and materially diminished, and that, although the plaintiffs might still have sufficient light for ordinary business purposes, they would probably have to use artificial light in the ground-floor room to a greater extent than at present.

In giving judgment Joyce J. said: "Various expert witnesses were examined, and as the result of their evidence I am of opinion that the proposed new building of the defendant would not affect the selling or letting value of the plaintiffs' premises." And he concluded his judgment as follows: "Apart from any question with respect to the back part of the office on the ground-floor of the plaintiffs' premises and to the extraordinary light required, if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiffs' premises would still in my opinion, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a

place of business. For all ordinary days they have amply sufficient light: at present they have abundance of light and are, in my opinion, unusually well lighted. If, as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed, without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building, if and when erected, is sufficiently serious to entitle the plaintiffs to an injunction. A great number of authorities have been cited before me: in my opinion it is not possible to reconcile them satisfactorily; but the defendant relies upon the most recent decision, that of Wright J. in *Warren* v. *Brown*. (1) After considerable hesitation, I have come to the conclusion that this decision, if it remains unreversed by the Court of Appeal, ought to govern the present case; and I think, sitting as a judge of first instance, I must follow it. Assuming, therefore, that I am right in this, I am of opinion that this action fails and must be dismissed, and with costs."

On December 21, 1900, that is, the day following his Lordship's judgment, the plaintiffs served the defendant with notice of appeal, but the defendant nevertheless proceeded with and completed his building.

On November 13, 1901, the decision in *Warren* v. *Brown* (1) was reversed by the Court of Appeal. (2) The appeal in the present case was heard on December 2 and 3, 1901.

Hughes, K.C., and *W. E. Vernon*, for the plaintiffs. The decision of Wright J. in *Warren* v. *Brown* (1) being no longer in our way, we submit that upon the facts of this case and upon the evidence we are entitled to an injunction. It is now clear that the defendant's new building must cause a substantial and material diminution of light to the two ground-floor windows in question; and, that being so, it follows that we suffer damage, and damage which is measurable in money, for it is proved that we shall be driven to increased artificial

(1) [1900] 2 Q. B. 722. (2) [1902] 1 K. B. 15.

C. A. 1901

HOME AND COLONIAL STORES, LIMITED v. COLLS.

light. Any substantial diminution is material, and gives a right of action, subject only to the qualification de minimis, &c. For instance, in *Martin* v. *Price* (1) damage to the extent even of 120*l.* was held to entitle the plaintiff to an injunction.

[ROMER L.J. The question of interference with light is to a great extent one of exigency: that is to say, you must have regard to the exigencies of life, and the ordinary amenities of life; and no slight interference with his light will give a man a right of action. You must look at the question from a broad point of view. If there is no substantial interference, then there is no right of action at all.]

If the plaintiff proves a substantial interference with his light, he is entitled to an injunction, according to the settled principles of the Court: *Kelk* v. *Pearson* (2); *City of London Brewery Co.* v. *Tennant* (3); Gale on Easements, 7th ed. p. 539; and he is not to be forced to accept damages instead, under Lord Cairns' Act (21 & 22 Vict. c. 27): *Shelfer* v. *City of London Electric Lighting Co.* (4) As the defendant in the present case has chosen to go on with and complete his building, we are entitled to a mandatory injunction. It is no answer to say that we must be content with an angle of 45 degrees of light: there is no such rule limiting a plaintiff's right to light.

[ROMER L.J. The angle of 45 degrees is not the test of a plaintiff's right: it is only a rough measure, and does not bind the Court in any way. If the Court finds the damage slight, such, for instance, as might be covered by 5*l.* or 6*l.*, it may order damages instead of an injunction; but I agree, if the damage is substantial and extensive, the plaintiff is entitled to insist on an injunction.]

The true test of a plaintiff's right to an injunction is whether the case is one in which substantial damages would be recovered at law: *Dent* v. *Auction Mart Co.* (5)

[VAUGHAN WILLIAMS L.J. The elastic rule of our predecessors of thirty-five years ago has given way to the hard

(1) [1894] 1 Ch. 276.
(2) (1871) L. R. 6 Ch. 809.
(3) (1873) L. R. 9 Ch. 212.
(4) [1895] 1 Ch. 287.
(5) (1866) L. R. 2 Eq. 238.

logic of recent decisions; but I cannot help saying that the observations of Lord Cranworth in *Clarke* v. *Clark* (1), to the effect that in light and air cases a different rule should be applied in towns from that which prevails in the country, are full of good sense. However, upon the recent decisions you are entitled to your pound of flesh.]

We rely simply upon our legal right, and ask for a mandatory injunction as in *Parker* v. *First Avenue Hotel Co.* (2), which exactly applies to this case. There, as here, the defendants chose to go on with their building after the judgment appealed from, and the Court of Appeal held that the plaintiff was entitled on appeal to a judgment such as he should have had at the trial. The form of judgment here should have been that in *Yates* v. *Jack*. (3)

Bray, K.C., O. L. Clare, and *A. B. Nutter,* for the defendant. The question is reduced to that of the interference with the light to two only out of the five front ground-floor windows, and the facts and evidence shew that, regarding these two windows only, there is no substantial diminution of light to the ground-floor room. It is necessary to consider the purposes for which this room is used. The business carried on there does not require any special or extraordinary amount of natural light. The electric light is already used there, and the only result of our new building will be that a little extra electric light may be required. The damage occasioned will thus be a small matter of some 5*l.* We submit that, upon the evidence, the finding of the learned judge below is correct—that there will be an extremely slight diminution of light.

[ROMER L.J. Upon the balance of evidence it seems to me that there is a substantial diminution of light, and consequent damage to the plaintiffs' property. Why, if there is substantial pecuniary damage, should not a plaintiff be entitled to relief?]

No doubt, where substantial damages would be given at law, as distinguished from some small sum of 5*l.*, 10*l.* or 20*l.*, a Court of Equity would interpose: *Aynsley* v. *Glover* (4); but the present is just one of those cases in which, by reason of

(1) (1865) L. R. 1 Ch. 16.
(2) (1883) 24 Ch. D. 282.
(3) (1866) L. R. 1 Ch. 295, 298.
(4) (1874) L. R. 18 Eq. 544, 552.

C. A. 1901 HOME AND COLONIAL STORES, LIMITED v. COLLS.

the trifling damage, the Court will not interpose. The real question is, looking at all the circumstances, is this a case for a mandatory injunction instead of damages? We submit not. In *Martin* v. *Price* (1) Kekewich J. found that there was a serious interference with light causing substantial damage, yet refused to grant a mandatory injunction, and gave damages instead; though upon the facts of that particular case the Court of Appeal did grant the injunction.

As to allowing a defendant to build up to an angle of 45 degrees, but no further, we do not say that there is any actual rule of law to that effect. As Cotton L.J. said in *Parker* v. *First Avenue Hotel Co.* (2), each case must depend on the question whether the defendant's new buildings do interfere with the plaintiff's lights; but, as Lord Selborne said in *City of London Brewery Co.* v. *Tennant* (3), the fact that 45 degrees of sky are left unobstructed may, under ordinary circumstances (and there are only ordinary circumstances here), be considered primâ facie evidence that there is not likely to be such material injury as to call for the interference of the Court. Under s. 3 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), in a claim to an indefeasible right to light, the "use" as well as the "access" of the light has to be considered.

The strongest case against us is *Parker* v. *First Avenue Hotel Co.* (2); but the Court does not there lay down, as a matter of principle, that there must be a mandatory injunction instead of damages. All that is said is that the Court will consider whether, under all the circumstances of the case, an order to pull down is just and right. This case, we submit, clearly comes within the "good working rule" laid down by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (4), namely, that damages may be given in substitution for an injunction, (1.) if the injury to the plaintiff's legal right is small, (2.) and is one capable of being estimated in money, (3.) and is one which can be adequately compensated by a small money payment, (4.) and the case is one in which it would be oppressive to the defendant to grant an injunction. That rule

(1) [1894] 1 Ch. 276.
(2) 24 Ch. D. 282, 289.
(3) L. R. 9 Ch. 212, 220.
(4) [1895] 1 Ch. 287, 322–3.

was referred to with approval in *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (1)

[VAUGHAN WILLIAMS L.J. But it is stated in *Shelfer* v. *City of London Electric Lighting Co.* (2) that the jurisdiction to award damages instead of an injunction ought not to be exercised "except under very exceptional circumstances."]

In considering whether there should be an injunction or damages, the Court will have regard to the extent of the plaintiff's interest. Here the plaintiffs' interest is that of lessees under a lease having not more than seventeen years to run; and they use their premises, not as a dwelling-house, but for commercial purposes only. The only evidence is that the clerks in this ground-floor room will have to use a little more electric light: it is not said they will suffer any discomfort.

Among the instances in which the Court will award damages instead of an injunction, Lindley L.J. in *Shelfer's Case* (3) mentions "cases in which a plaintiff has shewn that he only wants money." Now, this case is one in which money will compensate the plaintiffs. To order the defendant to pull down the top of his building would be oppressive to him and out of all proportion to the interest of the plaintiffs. In conclusion, as the injury to the defendant would be so serious and the benefit to the plaintiffs so small if an order to pull down were made, we suggest that the Court should direct a surveyor to inspect the new building and report to the Court; for whereas the case was tried in the Court below as a matter of opinion only, it may now be tried as a matter of fact.

[VAUGHAN WILLIAMS L.J. What do you say to that suggestion, Mr. Hughes?]

Hughes, K.C. We object. Unless you have a surveyor who saw the plaintiffs' building before its ancient lights were obstructed by the defendant's new building, he cannot possibly form an opinion as to the amount of obstruction now caused. We already have in evidence the opinion of experienced London architects and surveyors as to the state of things before the

(1) [1899] 2 Ch. 217, 259. (2) [1895] 1 Ch. 316.
(3) [1895] 1 Ch. 317.

C. A. 1901 HOME AND COLONIAL STORES, LIMITED v. COLLS.

erection of the new building and what it would be when the building was erected, and that is a sufficient guide to the Court. Moreover, this is a case involving such a mixed question of law and fact that an expert would treat it as such, and would in all probability take an erroneous view of the law, such as by applying the supposed rule of 45 degrees.

VAUGHAN WILLIAMS L.J. Although we have jurisdiction to order an inquiry, whether you consent or not, as you press your objection we will not force an inquiry upon you. We think that this is such a mixed question of law and fact that it would be impossible to get a satisfactory report from an expert, and an expert who is in fact not a lawyer.

We will consider this case.

Cur. adv. vult.

Dec. 20. The judgment of the Court (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) was delivered by

COZENS-HARDY L.J. This appeal raises a question as to the nature and amount of evidence required to entitle a plaintiff to relief by way of injunction for the protection of ancient lights. The action was tried by Joyce J. in December, 1900. This is important, because at that date it had been laid down by Wright J. in *Warren* v. *Brown* (1) that the owner or occupier of a house has no legal right of action so long as he has left to him as much light as is ordinarily required for habitation or business, even though he has been deprived of a substantial amount of light and has thereby suffered substantial damage. This view of the law was accepted by the defendant's counsel in the cross-examination of the plaintiffs' witnesses and in the examination of the defendant's witnesses, and, as we read the judgment, was adopted by Joyce J.

Wright J.'s decision has recently been reversed by this Court (2), and the true rule of law with reference to the interference with ancient lights has been authoritatively laid down thus: "If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant

(1) [1900] 2 Q. B. 722. (2) [1902] 1 K. B. 15, 22.

or owner is entitled to relief." In this sentence "substantial" does not indicate any particular percentage.

In *Back* v. *Stacey* (1) an issue was directed by the Lord Chancellor whether the ancient lights of the plaintiff in his dwelling-house had been illegally obstructed by the defendant's building. Evidence having been given that the quantity of light previously enjoyed had been diminished, it was contended that the plaintiff was entitled to a verdict; but Best C.J. directed the jury, in language which has been often cited with approval, thus: "It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house *uncomfortable*, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as *beneficially* as he had formerly done." And in *Parker* v. *Smith* (2) Tindal C.J. directed the jury as follows: "It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognises, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business."

Without substantial interference, there is no right of action; and in addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened. There is no standard or fixed amount of light to which alone a plaintiff is entitled. He must not be fanciful or fastidious: he must recognise the necessity of give and take in matters of this nature. But there may be real damage to the owner or occupier of a building used for particular purposes, or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes. The application of these principles is far more easy when the building which is complained of has

(1) (1826) 2 C. & P. 465, 466; 31 R. R. 679.

(2) (1832) 5 C. & P. 438, 439; 38 R. R. 828.

C. A. 1901 HOME AND COLONIAL STORES, LIMITED v. COLLS.

been erected and damages only are claimed; but they have to be applied when the plaintiff comes for an injunction before the building has been erected. It is the duty of the Court to arrive at the best conclusion it can upon the effect which the proposed building, if erected, would produce; and if the Court is satisfied that in that event the plaintiff would have a good cause of action, the plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient light; or, in other words, to restrain the defendant from committing a wrongful act.

The difficulty of applying the rule in a quia timet action may well induce the Court to scan the plaintiff's evidence with severity, especially where an angle of 45 degrees is left. It is settled that there is no rule of law that a man may always build up to an angle of 45 degrees; but, in judging of the probable effect of a proposed building, the Court may not unreasonably regard the fact that an angle of 45 degrees will be left as primâ facie evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence. This seems to be the result of the authorities.

It remains to apply these general principles to the present case. We propose to accept all the findings of fact by Joyce J. where they are clear without demur, and only to refer to the evidence where there is no finding, or where, as it seems to us, there are inconsistent findings. [His Lordship then stated the facts, and continued:—]

In giving judgment the learned judge said this: "Various expert witnesses were examined, and as the result of their evidence I am of opinion that the proposed new building would not affect the selling or letting value of the plaintiffs' premises." If that means that an ordinary purchaser or lessee would be content to get a building having the usual amount of light enjoyed by similar houses in this part of London, we see no reason to doubt it; but it is not a relevant statement. The plaintiffs are neither vendors nor lessors. They are occupiers; and their only desire is to use this ground-floor room for the same purposes as heretofore and with the same advantages. And it

seems to us impossible to hold that they will not suffer "real damage" if they have to consume and pay for more electric light than hitherto. Joyce J., at the end of his judgment, refers to Wright J.'s decision in *Warren* v. *Brown* (1), and says: "After considerable hesitation I have come to the conclusion that this decision, if it remains unreversed by the Court of Appeal, ought to govern the present case; and I think, sitting as a judge of first instance, I must follow it. Assuming, therefore, that I am right in this, I am of opinion that this action fails and must be dismissed."

As we read the judgment, it is a finding in favour of the plaintiffs that real damage would result, though light enough would be left for ordinary purposes of occupancy as a place of business, and there is no finding that the interference is not substantial. Now there was, immediately opposite the windows in question, what may be called "a gap," in width 36 ft. and in height 13 ft. 6 in. The direct light which passed through this gap penetrated to a considerable depth into the plaintiffs' room. The interference with this light is "substantial" within the meaning in which the word is used. There being some obscurity on this point, it seems right to examine the evidence. [His Lordship then went through the evidence, and proceeded:—]

If we consider the judge's notes of the evidence, as we have done, the conclusion at which we have arrived from reading his judgment is confirmed. In our opinion, on the balance of the evidence, substantial interference and "real damage" will result; and the proper judgment would have been to grant an injunction in the settled form known as the *Yates* v. *Jack* (2) form. But immediately after the action was dismissed with costs, the plaintiffs gave notice of their intention to appeal. Notwithstanding this, the defendant has proceeded with and completed the erection of his building. Under these circumstances there is only one course open to us. We must reverse Joyce J.'s judgment and give the plaintiffs the judgment to which, according to our view, they were entitled. And we must grant a mandatory injunction requiring the defendant to pull down anything erected in breach of the terms of our injunction. This point was really

(1) [1900] 2 Q. B. 722. (2) L. R. 1 Ch. 295, 298.

C. A. 1901

HOME AND COLONIAL STORES, LIMITED v. COLLS.

decided by the Court of Appeal in *Parker* v. *First Avenue Hotel Co.* (1) The defendant must pay the costs here and below.

VAUGHAN WILLIAMS L.J. The judgment which has just been read is the judgment of the Court; but I wish to add for myself that, so far as the rule of 45 degrees is concerned, I doubt very much whether that rule, as the law is now settled, can be regarded even as a rough measure of the right of the owner or occupier of ancient lights. (2)

Solicitors: *Slaughter & May; Hyde, Tandy, Mahon & Sayer.*

G. I. F. C.

C. A. 1901

Dec. 10, 12, 20.

In re MARTEN. SHAW *v.* MARTEN.

[1900 M. 2893.]

Power of Appointment—General Power—Exercise by Will—Extent of Exercise—Intention—Blending of appointed Property with Testator's own Property—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

A testatrix, who had a general power of appointment over the funds comprised in her marriage settlement, by her will in exercise of the power appointed that the trustees of the settlement should stand possessed of 9000*l.*, part of the funds, in trust for six persons named in the will. And in further exercise of the power she appointed that the trustees should stand possessed of the residue of the funds in trust as to 1000*l.* for W. P. Shaw, and as to the residue thereof in trust for Henry Shaw. And, after bequeathing some specific and pecuniary legacies, the testatrix made the following bequest: "As to the rest and residue of my real and personal estate I devise, bequeath, and appoint the same, subject to the payment thereout of my debts, funeral and testamentary expenses, unto Henry Shaw." Henry Shaw died before the testatrix. The testatrix had personal estate of her own, but she had no real estate:—

Held, by Romer and Cozens-Hardy L.JJ., that the testatrix had by her will exercised the power for all purposes and had blended the settlement funds with her own property, and that the appointed fund, so far as it had lapsed by the death of Henry Shaw, went, subject to the payment thereout of her debts and funeral and testamentary expenses and her

(1) 24 Ch. D. 287.

(2) As to the modern form of mandatory injunction, see *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438.

pecuniary legacies, to her next of kin, and not to the persons entitled under the settlement in default of appointment:

Held, by Vaughan Williams L.J., that, having regard to other clauses in the will, the testatrix had not shewn an intention to exercise the power for all purposes so as to make the settled fund her own, and that, so far as the appointment had lapsed, the fund went to the persons entitled in default of appointment.

Decision of Byrne J. reversed.

Per Romer L.J.: *In re Davies' Trusts*, (1871) L. R. 13 Eq. 163, and *In re De Lusi's Trusts*, (1879) 3 L. R. Ir. 232, distinguished.

Per Cozens-Hardy L.J.: *Coxen* v. *Rowland*, [1894] 1 Ch. 406, approved.

APPEAL against a decision of Byrne J., the question being whether a testatrix, in exercising a general power of appointment by will, had made the property, the subject of the power, her own, so that, on failure of the appointment by reason of the death of the appointee in her lifetime, the property went to her next of kin, or whether, on the other hand, it went, under the instrument which created the power, as in default of appointment.

Under the settlement dated October 4, 1880, made upon the marriage of H. J. Marten and Martha his wife, the stocks, funds, and securities specified in the 1st schedule to the deed, and also a sum of 5000*l.*, were vested in trustees, upon trust to pay the income thereof to the wife for her life, and, after her death and the failure of trusts by the deed declared in favour of the husband during his life and the issue of the marriage, upon trust (in the events which happened) for such person or persons and for such purposes as the wife should by deed or will appoint, and in default of appointment upon other trusts.

The husband died on November 3, 1892, and there were no issue of the marriage.

By her will, dated March 1, 1893, Martha Marten, after a recital of the settlement, the death of her husband, that there had been no issue of the marriage, and that she was desirous of making such appointments of the funds comprised in the settlement as were thereinafter contained, proceeded as follows: "Now, in exercise of the powers to me for this purpose given by the said indenture of settlement and of every other power or authority in anywise enabling me in this behalf,

C. A. 1901 MARTEN, *In re.* SHAW *v.* MARTEN.

I hereby appoint that the trustees for the time being of the said indenture shall stand possessed of the said sum of 5000*l.*, and the stocks, funds, and securities representing the same, and of such part of the stocks, funds, and securities comprised in the 1st schedule of the said indenture as shall with the said sum of 5000*l.*, or the securities representing the same, make up the sum of 9000*l.*," in trust in six equal shares for six persons respectively in the will named. "And in further exercise of the powers given to me by my said marriage settlement, and of all and every other power, &c., I hereby appoint that the trustees for the time being of the said settlement shall stand possessed of the residue of the stocks, funds, and securities comprised in the 1st schedule thereto in trust as to 1000*l.* part thereof for W. P. Shaw, and as to the residue thereof in trust for my brother Henry Shaw." The testatrix then made several specific legacies of articles of plate and jewellery, which were specified in the 2nd schedule to the settlement, and then she continued: "I bequeath all other my diamonds to my said brother Henry Shaw absolutely. I bequeath the residue of my jewellery and personal and household ornaments and linen and my piano to my said brother Henry Shaw. I bequeath my silver tea and coffee service to my cousin James Briggs. I bequeath all and singular my household furniture and effects (not hereinbefore specifically bequeathed), carriages, live and dead stock, which shall be in and about my dwelling-house at the time of my death, to E. D. Marten absolutely." The testatrix then bequeathed four pecuniary legacies of 1500*l.* each, and continued: "And I empower the trustees of my said settlement and my executors hereinafter named at their discretion respectively, with the consent of the respective appointees and legatees, to appropriate any security or investment subject to my powers of appointment or belonging to me at the time of my decease at the market value of the day in or towards payment and satisfaction of the legacies hereinbefore appointed or bequeathed. I bequeath to my maid Jane Graves the sum of 50*l.* free of duty. And as to the rest and residue of my real and personal estate I devise, bequeath, and appoint the same, subject to the payment

thereout of my debts, funeral and testamentary expenses, unto my said brother Henry Shaw absolutely." And the testatrix appointed Henry Shaw and E. D. Marten executors of her will.

The testatrix died on July 2, 1900. She had no real estate.

Henry Shaw died on May 28, 1900, in the lifetime of the testatrix.

Upon a summons issued by the trustees of the settlement, Byrne J. held that the residue of the funds comprised in the 1st schedule to the settlement, the appointment of which had failed by reason of the death of Henry Shaw, went to the persons entitled under the settlement in default of appointment.

The next of kin of the testatrix appealed.

Renshaw, *K.C.*, and *Buckmaster*, for the next of kin. It is contended that in the residuary clause the testatrix has shewn an intention of making her own property and the property over which she had the general power of appointment one for all purposes. She shews this by using the apt words, "I devise, bequeath, and appoint," and by then creating on the properties so given a general charge, without distinction, of debts and funeral and testamentary expenses. There is nothing in the prior part of the will to exclude the ordinary meaning of the word "appoint." And then, besides the charge of debts, &c., there is also a charge of legacies on the settlement funds in a certain event. The respondents will, no doubt, rely on *In re Boyd* (1); but there it was clear that the testatrix had not indicated an intention of making the fund subject to the power her own for all purposes: by the word "residue" she clearly meant the residue of her own moneys, and not the residue of the fund the subject of the power; and the words she used had no reference to that fund: moreover, there was no direction for payment of debts. The case which really covers the present is *In re Pinède's Settlement*. (2)

Levett, *K.C.*, and *J. Chester*, for the persons entitled in default of appointment. The death of Henry Shaw before the testatrix was equally fatal to the appointment and to the

(1) [1897] 2 Ch. 232.

(2) (1879) 12 Ch. D. 667.

C. A. 1901 MARTEN. *In re.* SHAW *v.* MARTEN.

residuary gift to him; he could not possibly take under either the residuary gift or the appointment. If he had survived the testatrix he would have taken under the appointment. If a testator, under a general power of appointment, appoints Blackacre to A., and then makes a residuary devise to A., it will be assumed that he did not intend Blackacre to pass under the residuary devise. There is an inconsistency, which shews a "contrary intention" within the meaning of s. 27 of the Wills Act: *Scriven* v. *Sandom.* (1)

[COZENS-HARDY L.J. *Coxen* v. *Rowland* (2) appears to decide the point against you.]

In the direction to the trustees and her executors to appropriate securities the testatrix has distinguished between her own property and the property subject to the power. This shews that she did not intend to blend the whole into one: *Easum* v. *Appleford* (3); Theobald on Wills, 5th ed. p. 219; *In re De Lusi's Trusts.* (4) Independently of the Wills Act, there would not have been an exercise of the power by the residuary gift. In *Oke* v. *Heath* (5) Lord Hardwicke was dealing with a special power, not a general one. The test is whether the testatrix intended to exercise the power for a limited purpose only, or to make the property subject to the power her own for all purposes: *In re Davies' Trusts* (6); *In re Boyd* (7); *In re Thurston.* (8) Here, it is submitted, the power was exercised for a limited purpose, namely, to benefit Henry Shaw. In *Coxen* v. *Rowland* (2) the testatrix described the house which she had power to appoint as "my messuage." In the present case, if there had not been sufficient personal estate of the testatrix to pay her pecuniary legacies, the legatees could not have compelled Henry Shaw, if he had been living, to pay them.

Renshaw, K.C., in reply. *Easum* v. *Appleford* (3) does not apply. The reasoning in *In re Davies' Trusts* (6) is not easy to follow, and, if necessary, this Court can overrule it. An

(1) (1862) 2 J. & H. 743.
(2) [1894] 1 Ch. 406.
(3) (1840) 5 My. & Cr. 56; 51 R. R. 238.
(4) 3 L. R. Ir. 232.
(5) (1748) 1 Ves. Sen. 135.
(6) L. R. 13 Eq. 163.
(7) [1897] 2 Ch. 232.
(8) (1886) 32 Ch. D. 508.

appointment to executors of property over which a testator has a general power of appointment takes the property away from the persons entitled in default of appointment: *In re Ickeringill's Estate* (1); and so does an appointment of real estate to trustees upon trust for a person who dies before the testator: *Willoughby Osborne* v. *Holyoake*. (2) In *In re Thurston* (3) and in *In re Boyd* (4) there was no direction to pay debts and funeral and testamentary expenses, as there is in the present case. There is here a recital of the power and an expressed intention to exercise it, followed by an appointment which would exhaust the fund. Then follows the residuary gift and the direction to pay debts. If the estate of the testatrix had been insolvent, the executors would have been entitled to have the debts paid out of the appointed property. In such a case the executor would be the person to administer the fund.

[COZENS-HARDY L.J. referred to *In re Hoskin's Trusts*. (5)]

In re Philbrick's Trusts (6) also bears on the point.

Cur. adv. vult.

Dec. 20. VAUGHAN WILLIAMS L.J. read a judgment, in which, after stating the facts, he continued:—The question arises whether the residue of the settlement funds, which the testatrix appointed in favour of Henry Shaw, the appointment having lapsed by reason of his death before her, devolves as directed by the instrument creating the power in default of appointment, or whether it is comprised in the gift of the residue at the end of the will. Byrne J. has decided that it passed as in default of appointment; and, in my opinion, his judgment should be affirmed.

In my judgment the testatrix did not intend to take the appointed property out of the instrument creating the power for all purposes, but only for the purpose of giving effect to the particular dispositions expressed. I think that in this case there is no intention to appoint the residue strictly as residue, or to appoint the entire fund charged with the sums specified

(1) (1881) 17 Ch. D. 151.
(2) (1882) 22 Ch. D. 238.
(3) 32 Ch. D. 508.
(4) [1897] 2 Ch. 232.
(5) (1877) 6 Ch. D. 281.
(6) (1865) 13 W. R. 570.

C. A. 1901 MARTEN, *In re.* SHAW *v.* MARTEN. Vaughan Williams L.J.

in the preceding appointments. I think that the residuary clause is not intended to operate as an appointment of the settled property, or any part of it, and that, therefore, the appointment in favour of Henry Shaw having failed by reason of his death, the settled property to that extent must go, as provided by the settlement which created the power, in default of appointment.

The question in all cases of this class is, as was pointed out by Chatterton V.-C. in *In re De Lusi's Trusts* (1), and approved by Jessel M.R. in *In re Pinède's Settlement* (2), one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed. The meaning must, of course, be gathered from the words of the will. It is really a question of construction of the residuary clause. No doubt here the words taken by themselves are such as would be construed as an exercise of the power of appointment for purposes which involved treating the appointed property and the testatrix's own property as one fund. But, having regard to the mode in which the particular appointments are expressed in the earlier part of the will, I cannot think that the words ought to be so construed, and I do not suppose that this conclusion would be doubted, but for the presence of the word "appoint" in the residuary clause. [His Lordship read the residuary clause, and continued :—]

I do not think that much weight ought to be given to the use of the word "appoint" in this clause. It seems to me only one of a catalogue of words used to cover any case which might arise, just as the word "devise" is used, although there is no real property on which that word can operate.

I see nothing in this clause, or in the use of the word "appoint," or in the words "subject to payment thereout of my debts, funeral and testamentary expenses," to shew that the testatrix had any intention by her will to do more than the law would do, if she exercised the power without any direction in the will.

(1) 3 L. R. Ir. 232. (2) 12 Ch. D. 667.

The case, except for the use of the word "appoint," seems to me covered by the decision in *In re Davies' Trusts.* (1) I can see nothing in the will which shews an intention of the testatrix to mass her own property and the settled property. On the contrary, I find that she does not appoint trustees of her own, but appoints that the trustees for the time being of the settlement which created the power shall stand possessed of the funds, the subject of the power, in trust for the beneficial appointees, and it seems to me that this fact alone primâ facie negatives any intention to mass her own property and the settled property, or to take the appointed property out of the settlement for all purposes. I find, moreover, later in the will a distinct indication of the intention of the testatrix to keep her own property and the settled property distinct, in the clause which distinguishes the discretion to be exercised by the trustees of the settlement and the executors of the will in the appropriation of securities. These indications of an intention of the testatrix that her own property and the settlement property shall not be massed seem to me to be so strong as positively to negative any intention to mass the two properties, notwithstanding the use of the word "appoint."

It is not to be forgotten that this testatrix had property of her own, besides the property over which she had a general power of appointment, upon which the residuary clause could operate, if treated as applying only to her own property. In my judgment this clause was not intended to include the personal estate the subject of this general power. I think a contrary intention appears by the will.

I cannot see that *Oke* v. *Heath* (2) compels me to come to a different conclusion. In that case a testatrix had a limited power of appointment among her kin. She appointed the whole fund to her nephew, and "all the rest and residue of what she had power to dispose of" she gave to her niece after paying some legacies thereout. The nephew died in her lifetime, and it was held that the fund passed to the niece. It seems to me that there the words of the residuary clause plainly made the niece residuary appointee of so much of the fund as the testatrix had not appointed effectively to other of

(1) L. R. 13 Eq. 163. (2) 1 Ves. Sen. 135.

C. A. 1901 MARTEN, *In re.* SHAW *v.* MARTEN.

her kin. The gift of the residue had nothing to operate upon except what might fail to take effect under the previous appointment. The testatrix could not by any appointment have made the property her own.

ROMER L.J. To my mind this is a difficult case, and I can well understand that different minds may differ about it. For myself, I have come to the conclusion that the appellants are right in their contention. I think the key to the solution of the ultimate question we have to decide is to be found in a consideration of the residuary gift in the will. Was there in that gift an exercise by the testatrix of all her general powers of appointment, so far as they had not otherwise been effectually exercised? In other words, was the residuary gift what I may call a true residuary appointment? In my opinion it was. The testatrix uses the words "devise, bequeath, and appoint." Those words are apt to pass three different kinds of property. "Devise" is apt to cover real estate, "bequeath" to cover personal estate, and "appoint" to cover property over which the testatrix had a power of appointment. I do not think it could be really doubted that, if this residuary gift had stood by itself and there were nothing in the prior parts of the will to qualify its general construction, it would be held to be a clear residuary appointment—a clear exercise by the testatrix of all her general powers of appointment. Is there, then, anything in the prior parts of the will which can justify the Court in cutting down the effect of the residuary appointment—in saying that it was not intended to include the property comprised in the settlement which is the subject of this appeal? I think not. In the first place, I think it is reasonably clear that the mere fact that the testatrix had already appointed the whole of the settlement funds would not be sufficient, for there would still be an object in a residuary appointment. It would cover any part of the previously appointed property which might lapse. Of course, when a testatrix previously appoints property which she has power to appoint to specified persons, and then exercises her general power of appointment by a residuary appointment, she does not as a general rule contemplate the possible failure of the prior appointments. But

similarly when a testator makes a specific gift he does not as a general rule contemplate that, if that gift fails, his residuary bequest will include the property specifically given, and yet the true effect and object of an ordinary residuary gift is to cover all properties which have not been already effectually disposed of. And I cannot see, in the fact that in this case all the settlement funds had been previously appointed to different appointees, any sufficient ground for saying that the ultimate appointment did not take effect so far as there was a failure by lapse of any of the prior appointments. Nor, to my mind, is there anything to negative the effect of the residuary appointment in the fact that the prior appointments had been made by way of direction to the trustees of the settlement to pay the appointees, and not by means of direct appointments to the appointees. But it is said that an intention to exclude the settlement funds is shewn by the fact that Henry Shaw, who was an appointee under the earlier part of the will, was also the appointee under the residuary appointment. But, in the first place, Henry Shaw was not under the previous appointments the appointee of the whole of the settlement funds; and, secondly, by the residuary appointment there was created a charge of debts and funeral and testamentary expenses, which could and would take effect in case of lapse by reason of the death of Henry Shaw before the testatrix. So that, even in that case, there would still be an object in the testatrix exercising her general powers by a residuary appointment. Nor can I find anything else in this will which would, in my view, justify the Court in refusing to give to the residuary gift and appointment its ordinary meaning and effect. I should add that, besides the charge of debts and funeral and testamentary expenses, it appears to me that the pecuniary legacies were also charged by the residuary gift on the appointed funds so far as there was a lapse, so that the legacies also would be payable out of the settlement fund, if the appointment lapsed, as well as out of the testatrix's own property.

Now that being so, and taking it that the residuary gift operated as a general residuary appointment, we come to the question, whether, so far as by reason of a lapse the settlement funds are included in the residuary bequest and appointment,

C. A. 1901 MARTEN, *In re.* SHAW *v.* MARTEN. Romer L.J.

they are not blended by the testatrix with her own property so as to form one mass and devolve in the same way, in case to any extent the residuary gift should fail by reason of lapse by the death of the residuary legatee. In my opinion the two properties are in this will so blended. The testatrix describes both properties as, and they both passed under the description of, the rest and residue of her real and personal estate. Both are made as one mass subject to the payment of her debts and funeral and testamentary expenses, and both, in my opinion, are also subject to the payment thereout of the pecuniary legacies bequeathed by the will. This, I think, sufficiently shews the intention of the testatrix to make both properties one for all purposes, and, in my opinion, the case is governed by the principle on which Jessel M.R. acted in *In re Pinède's Settlement.* (1)

I will only add a few words on two of the cases which have been cited. *In re Davies' Trusts* (2) turned, as it seems to me, on the fact that there the testatrix, who had a general power of appointment, had not in her residuary gift in terms purported to exercise that power; and Wickens V.-C. appears to have thought that, so far as there was a lapse by reason of the death of one of the residuary legatees, the residuary gift operated by virtue of s. 27 of the Wills Act as an exercise of the general power only to a limited extent—that is, for the limited purpose of paying debts and legacies. So that, in the view of the Vice-Chancellor, there was no true blending of the testatrix's own property with the property subject to the power of appointment so as to form one mass, which had to be dealt with accordingly. Whether this view was quite satisfactory in regard to the facts of that particular case, I need not consider. I need only say that that decision certainly does not, in my opinion, cover the present case. With regard to *In re De Lusi's Trusts* (3), there again there was no such intention to blend as I have mentioned shewn in the will. As Chatterton V.-C. said (4), the residuary gift in that case was equivalent to a gift in these words: "I hereby appoint to my sister all the residue of the fund comprised in my marriage settlement

(1) 12 Ch. D. 667.
(2) L. R. 13 Eq. 163.
(3) 3 L. R. Ir. 232.
(4) Ibid. 237.

which I have not already appointed." That being so, no doubt it could not be said that that alone gave a sufficient indication of the intention of the testatrix to blend the properties for all purposes; and, as I understand that case, there was nothing else in the will from which such a blending could be made out. I can see no reason for even suggesting that that case was not well decided; but it appears to me that it forms no precedent which can prevent the Court from deciding the present case in the way which I have indicated. For these reasons I think that this appeal ought to be allowed.

COZENS-HARDY L.J. read the following judgment:—I am unable to adopt the view which was taken by Byrne J. [His Lordship stated the facts, and continued:—]

In my opinion the residuary clause is a true residuary clause. It expressly blends into one fund that which was the testatrix's own property and that over which she had a general power of appointment, the whole being made subject to her debts, funeral and testamentary expenses. We are asked to say that, having appointed the residue of the fund to Henry Shaw in the earlier part of the will, she cannot have intended to appoint it to the same person in the subsequent part of the will. When, however, I once arrive at the conclusion that the ultimate clause is a true residuary clause, it must be taken to operate upon everything which may have failed to take effect under the prior appointment: *Oke* v. *Heath* (1); and it makes no difference that the appointee in both cases is the same person. The decision of Stirling J. in *Coxen* v. *Rowland* (2) is directly in point, and I think it is correct. It follows that, in my opinion, the next of kin of the testatrix are entitled to that part of the scheduled property which has not been effectually appointed, and that the title of the persons who would have taken in default of appointment is defeated.

Solicitors: *A. Toovey, for Bennett, Boycott & Co., Buxton; J. & R. Gole, for Dixon & Syers, Liverpool; Ullithorne, Currey & Jennings, for Neve, Cresswell & Sparrow, Wolverhampton.*

(1) 1 Ves. Sen. 135. (2) [1894] 1 Ch. 406.

W. L. C.

C. A.
1902
Jan. 23.

In re SCHMARR.

[1900 S. 064.]

Practice—Costs—Compulsory Purchase of Land by Public Body—Wilful Neglect of Vendor to make out Good Title—Payment of Purchase-money into Court—Costs of Petition for Payment out—Discretion of Court—Refusal of Vendor to give Possession—Warrant to Sheriff—Sheriff's Costs —"Deduction" from Purchase-money — Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 80, 91—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

Notwithstanding that in s. 80 of the Lands Clauses Consolidation Act, 1845, certain cases are excepted from the power thereby given to the Court to order costs to be paid by the promoters of an undertaking when money has been deposited in court, the Court has now, by virtue of s. 5 of the Supreme Court of Judicature Act, 1890, a discretionary power to order payment of costs in the excepted cases.

The sheriff's costs of a warrant to give possession of land, incurred after payment of the purchase-money into court by the promoters, were ordered to be paid out of the fund in court.

Appeal by the London County Council against an order of Byrne J. that the council should pay the costs of a petition for the payment out of court of 1000*l.*, which had been deposited by the council under s. 76 of the Lands Clauses Consolidation Act, 1845. The 1000*l.* was the amount of compensation assessed by a jury in respect of some houses belonging to Heinrich Schmarr, which the council had given notice to take under the powers conferred on them by the London County Council (Improvements) Act, 1897. The money was paid into court under s. 76 on the ground that Schmarr had wilfully neglected to make out a good title to the property.

A petition for payment out of the 1000*l.* was presented by A. F. Allman, who had obtained a charge upon the fund. The petition was served upon the London County Council, Schmarr, and some other incumbrancers upon the property or on the compensation money.

Upon the hearing of this petition Byrne J. directed inquiries as to the incumbrances on the fund. And it was ordered that the London County Council should pay the taxed costs of the

petitioner and of the respondent incumbrancers of and incident to the petition.

Against the order for payment of costs the London County Council appealed.

F. Thompson (*Upjohn, K.C.*, with him), for the London County Council. As regards Schmarr, it is clear that he wilfully neglected to make out a good title to the land, and therefore s. 80 (1) of the Lands Clauses Consolidation Act, 1845, does not empower the Court to order the promoters, i.e., the London County Council, to pay the costs of a petition by him for the payment of the money out of court. And it is submitted that any person who claims through him stands in this respect in the same position as he does. The incumbrancers may be entitled to costs out of the fund, but they are not entitled to costs as against the London County Council. Sect. 80 does not apply to these costs. It was the duty of Schmarr and his incumbrancers to carry out the contract, and to receive the purchase-money, and but for the neglect to perform this duty the money would not have come into court at all.

Sheldon and *Ralph Combe*, for the petitioner. The real reason for paying the money into court was the state of the title.

[COZENS-HARDY L.J. Have you considered the effect of s. 5 of the Supreme Court of Judicature Act, 1890, and the

(1) By s. 80, "In all cases of monies deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court . . . . to order the costs of the following matters . . . . to be paid by the promoters of the undertaking (inter alia) the costs of obtaining . . . . the orders . . . . for the payment out of court of the principal of such monies . . . . and of all proceedings relating thereto."

By s. 5 of the Supreme Court of Judicature Act, 1890, "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

C. A. 1902 SCHMARR. *In re.*

decision of the Court of Appeal in *In re Fisher*? (1) Even if Mr. Thompson is right as to the effect of s. 80, does not s. 5 now empower the Court to order the London County Council to pay these costs?]

If s. 5 applies the Court has a discretion, and, the judge having exercised his discretion, there is no right of appeal: Judicature Act, 1873, s. 49.

E. Ford; and *G. T. Sills*, for the other respondents.

F. Thompson, in reply. Sect. 5 is "subject to the express provisions of any statute." Sect. 80 contains an "express provision." Its meaning is that costs are not to be paid by the promoters in the excepted cases. No discretion is given to the Court. In *In re Fisher* (1) the Act in question contained no provision whatever as to costs.

VAUGHAN WILLIAMS L.J. Mr. Thompson has not been able to get over the difficulty which is based on s. 5 of the Act of 1890. [His Lordship read the section.] He did not argue, and he could not properly have argued, that these costs are not covered by that section, unless he could establish that they are excluded by the words "subject to the express provisions of any statute." In order to establish that, he is obliged to contend that in effect s. 80 provides that in the cases covered by the exceptions mentioned in it costs shall not be paid by the promoters. It seems to me that s. 80 does nothing of the sort. It is true that s. 80 authorizes the Court to give costs only in cases other than those which are excepted. But then comes s. 5 of the Act of 1890, which, in my opinion, places these excepted costs in the discretion of the Court or judge. We have, therefore, no power to interfere with the exercise of the discretion by Byrne J. in the present case, and, even if we had the power, I can see no reason why we should do so.

STIRLING L.J. I am of the same opinion. I will assume that this purchase-money has been paid into court by the London County Council under clause 76 of the Lands Clauses Act by reason of the wilful neglect of Schmarr, the vendor of the land in respect of which it was paid, to make out a good

(1) [1894] 1 Ch. 450.

title to the land. No question arises as to any costs payable to Schmarr himself. He incumbered the purchase-money, and to some extent also the land, and a petition has been presented by one of the incumbrancers for payment out of the fund which is now in court, and it is said that the Court has no jurisdiction to make an order for the payment by the London County Council of the costs of that petition. Mr. Thompson contended that such a case as this does not fall within s. 80 of the Lands Clauses Act, and, as I have not heard the whole of the argument to the contrary, I will only say that, as at present advised, I agree with Mr. Thompson's argument. Sect. 80 applies to all cases in which moneys have been deposited in the bank, except when (inter alia) the moneys have been so deposited "by reason of the wilful neglect of any party to make a good title to the land required." That is the present case. I assume, therefore, that the Court would have no jurisdiction under s. 80 to order payment of the costs of this petition. But then comes s. 5 of the Act of 1890. [His Lordship read it.] It was held in *In re Fisher* (1) that this section applies to the costs of a petition presented under any of those old statutes relating to the compulsory purchase of land by a company or public body which contained no provision as to the costs of payment out of court of money paid in under the statute. There is a long series of decisions in the Court of Chancery that under those Acts costs could not be awarded by the Court to a petitioner for payment out of court of purchase-money paid in by the promoters. In order to escape from *In re Fisher* (1), Mr. Thompson contended that there is an "express provision" in s. 80 of the Lands Clauses Act—that is, that upon the true construction of s. 80 it does not merely except from its operation such a case as the present, but actually prohibits the Court from giving costs in such a case. I fail to see that that is so. It seems to me that s. 80 only abstains from conferring jurisdiction in such a case, but that it does not amount to a legislative prohibition of giving any costs even of proceedings in Court in the excepted cases. And, as regards this particular case, it seems to me that there would be very great hardship if the Court had no jurisdiction to deal

(1) [1894] 1 Ch. 450.

C. A. 1902 SCHMARR. *In re.* Stirling L.J.

with the costs of such a petition; for it is obvious (and this, as I understand, was the view taken by the learned judge in the Court below) that, owing to the state of the title to the purchase-money, it would have been necessary for the protection of the London County Council that the money should come into court. Now, although the vendor has been in default, yet there has been no default on the part of any of the incumbrancers. The money could not be got out of court without the presentation of a petition, and, if the Court had no jurisdiction to make an order for the payment of the costs of the petition in such a case, there would, in my opinion, be a defect in the authority of the Court. I think that s. 5 was intended to remedy such defects, and that the present case falls entirely within the scope of it. That being so, Byrne J. had jurisdiction to make this order for the payment of the costs of the petition, and we have no power to disturb it.

COZENS-HARDY L.J. I agree. I adopt for the present purpose (although it would not be right finally to decide the point) Mr. Thompson's argument, that s. 80 has no application to this case. That section deals with much more than the costs of the proceedings in Court: it includes the costs of the purchase of the land, and of a number of other things beyond and altogether outside the proceedings in Court. I assume that Mr. Thompson is right, and that the London County Council are not liable to pay any costs under and by virtue of s. 80. But still the question remains, is there in that section any "express provision" which prevents the Court from possessing the discretion which is in terms given to it by s. 5 of the Act of 1890? I think not. I think that the language of the Court of Appeal in *In re Fisher* (1) shews clearly that in a case like the present, which ex hypothesi is outside s. 80, the Court, although it could not give the costs of the reinvestment in land, has full power to give the costs of any proceedings in Court. The only order as to costs which Byrne J. has made relates to the costs of the proceedings in Court. Even if we had power to interfere with his exercise of discretion, I should not feel disposed to do so.

(1) [1894] 1 Ch. 450.

It may be useful to mention another point which was decided during the argument, though it was not referred to in the judgments. On December 27, 1899, the purchase-money was paid into court, and the London County Council executed a deed-poll, under s. 77 of the Lands Clauses Act, vesting the property in themselves. In January, 1900, they required Schmarr to give up possession, and he neglected to do so, and the council, under s. 91, issued a warrant to the sheriff to deliver possession, which he did accordingly. The sheriff's costs amounted to 19*l.* 7*s.* 6*d.*, and the council, on the hearing of the petition, claimed to have this sum paid to them out of the fund in court. Byrne J. disallowed this claim. The council appealed.

F. Thompson, for the council, relied on s. 91, which provides that if the owner or occupier of any lands refuses to give up possession thereof to the promoters of the undertaking, or hinders them from taking possession of the same, they may issue their warrant to the sheriff to deliver possession of the same to the person appointed in the warrant, and the costs accruing by reason of the issuing and execution of the warrant "shall be paid by the person refusing to give possession, and the amount of such costs shall be deducted and retained by the promoters of the undertaking from the compensation, if any, then payable by them to such party, or, if no such compensation be payable to such party," the costs shall be levied by distress. [He referred to *Re Turner's Estate.* (1)]

Sheldon, for the petitioner, argued that the costs could only be "deducted" or "retained" before the money was paid into court, and, this not having been done, the council could recover the costs only by a distress.

THE COURT, without giving any formal judgment, held that the council were entitled to be paid the 19*l.* 7*s.* 6*d.* out of the fund in court, and allowed the appeal on this point.

Solicitors: *W. A. Blaxland; Stileman & Neate; G. Coote; Walter Thompson.*

(1) (1861) 10 W. R. 128.

W. L. C.

KEKEWICH J.

1902

Jan. 17.

In re LEAS HOTEL COMPANY. SALTER *v.* LEAS HOTEL COMPANY.

[1901 L. 2804.]

Company — Debenture — Goodwill — "Property" — Jurisdiction to appoint Manager—Debenture-holder's Action.

Debentures issued by a hotel company charged all the company's "lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future":—

Held, that the word "property" was sufficient to include the goodwill or business of the company, and that therefore, in a debenture-holder's action, the Court had jurisdiction to appoint a manager.

Jennings v. *Jennings*, [1898] 1 Ch. 378, and *In re David and Matthews*, [1899] 1 Ch. 378, applied.

MOTION.

This action was brought by the plaintiff, on behalf of himself and all other holders of debentures issued by the defendant company, to have the debentures and the charge thereby created enforced by foreclosure or sale, and for the appointment of a receiver or manager of the property comprised in the charge and of the undertaking and business of the company.

On March 5, 1898, the company, which carried on the Leas Hotel at Folkestone, issued thirty debentures of 100*l.* each. Six of these debentures were held by the plaintiff.

By each of the debentures the company charged "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future," with payment of principal and interest at 6 per cent., but there was no express mention of the goodwill or business of the company.

The plaintiff moved the Court for the appointment of a receiver and manager. It was admitted that the case was a proper one for the appointment of a receiver and manager, but the question was raised whether, having regard to the absence of any express mention in the debentures of the goodwill or business of the company, the Court had jurisdiction to appoint a manager.

P. S. Stokes, for the plaintiff, submitted that the words of the debenture were sufficient to comprise the goodwill and business of the company, and that therefore the Court had power to appoint a manager. [He referred to *Peek* v. *Trinsmaran Iron Co.* (1), *Makins* v. *Percy Ibotson & Sons* (2), *Whitley* v. *Challis* (3), *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (4), *Jennings* v. *Jennings* (5), and *In re David and Matthews.* (6)]

Hon. Frank Russell, for the company, did not oppose the application.

KEKEWICH J. The question whether I have jurisdiction to appoint a manager depends entirely on the question whether the goodwill or business of the company is charged by the debentures. The words of the debentures are these: The company thereby charges "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future." The company is carrying on the business of a hotel, and the question is whether these words include that business. The test in all these cases is whether, in the event of the realization of the security, the business or goodwill can be sold under the order of the Court; or, in other words, whether the plaintiff under the order of the Court can make a good title to a purchaser. That again depends on the question whether the goodwill or business is expressly or by implication included in the property charged, so as to make it part of the security. That was clearly pointed out by the Court of Appeal in *Whitley* v. *Challis* (3), and it has been pointed out again and again in many cases. But nevertheless it seems constantly to be forgotten in practice that the duty of a manager is only to manage for the purpose of realization, and until he can conveniently realize. Notwithstanding that, I have frequently before me applications that the manager shall go on managing for the purpose of making a profit.

(1) (1876) 2 Ch. D. 115.
(2) [1891] 1 Ch. 133.
(3) [1892] 1 Ch. 64.
(4) [1895] 1 Ch. 629.
(5) [1898] 1 Ch. 378.
(6) [1899] 1 Ch. 378.

KEKEWICH J.

1902

LEAS HOTEL COMPANY, *In re.* SALTER *v.* LEAS HOTEL COMPANY.

I always insist upon realization at the earliest convenient moment, and upon management only to that end. *Whitley* v. *Challis* (1) was a peculiar case. The security there was extremely like an ordinary mortgage, and quite different from the usual form of a debenture. It was a mortgage of a building agreement and all the premises comprised therein, and the hotel or building to be thereafter erected. There were no additional words which could be construed as passing the business carried on in the hotel, and for that reason, and because the business could not be sold by a mortgagee by the intervention of the Court, the Court of Appeal refused to appoint a manager, and explained their decision at length on that ground. On the other hand, I have before me the two cases of *Jennings* v. *Jennings* (2) and *In re David and Matthews*. (3) *Jennings* v. *Jennings* (2) was a partnership case, and Stirling J., in deciding it, had to consider whether the goodwill was comprised in the words "assets of the partnership," and he held that it was. He says (4): "What the certificate speaks of is 'the assets' of the partnership; the goodwill is not expressly mentioned. It was not disputed that the word 'assets' includes the goodwill so far as it constitutes property." He treated the goodwill as "property." If it is property of a partnership, clearly it is property of a company. On that he not only says, as I understand, that goodwill is included under assets, but takes care to shew that it is assets because it may be treated as property. In *In re David and Matthews* (3) Romer J. had different words to construe, namely, the words "effects and securities," and the learned judge, following *Jennings* v. *Jennings* (2), thought that those words were sufficient to cover the goodwill. Here the words are, "all property and effects whatsoever." If as regards a partnership the words "partnership assets" or "effects" cover goodwill, it would seem that the word "property" must also cover goodwill. Then, is there any distinction for this purpose between the case of a partnership and that of a

(1) [1892] 1 Ch. 64.
(2) [1898] 1 Ch. 378.
(3) [1899] 1 Ch. 378.
(4) [1898] 1 Ch. 384.

company? I know of none. A company is simply a partnership on special terms authorized by the Legislature, and what is true of a private partnership must be true of a joint stock company. I therefore think that the goodwill passed under this debenture, and grant this application accordingly.

KEKEWICH J.
1902
LEAS HOTEL COMPANY, *In re.*
SALTER *v.* LEAS HOTEL COMPANY.

Solicitors: *Dod, Longstaffe, Son & Fenwick; F. G. Lewis.*

C. C. M. D.

In re OSBORNE AND BRIGHT'S, LIMITED.

KEKEWICH J.
1902
Jan. 17.

[1901 O. 1316.]

Settled Land Acts—Conflict between Provisions of Will and Provisions of Act—Consents necessary to exercise of Power by Trustees of Will—Undivided Shares—Several Persons constituting Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 56, *sub-s.* 2—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6, *sub-s.* 2.

Where by a will a power of sale was given to the trustees of the whole estate, but undivided shares were separately settled:—

Held, that there was a conflict, within the meaning of s. 56, sub-s. 2, of the Settled Land Act, 1882, between the provisions of the will and the provisions of the Act; that the tenants for life of undivided shares did not together constitute, within the meaning of s. 6, sub-s. 2, of the Settled Land Act, 1884, a tenant for life for the purposes of the Act of 1882, and that therefore the consents of all the persons who were tenants for life, or persons having the powers of tenants for life, of the undivided shares were necessary to the exercise of their power of sale by the trustees of the will.

ADJOURNED SUMMONS under Vendor and Purchaser Act, 1874.

Edward Corn Osborne by his will dated December 22, 1885, appointed his sons-in-law, Charles Vero and John Rocliffe Lee, trustees and executors thereof, and gave, devised, and bequeathed all his real estate, and also all the residue of his personal estate, to his trustees, upon trust that they should stand possessed of his real estate and residuary personal estate, and of the investments and proceeds thereof, in the following manner, namely: As to one-fifth part or share thereof to his daughter Emily Sophia Vero; another one-fifth part or share thereof to his daughter Frances Mary Williams; another one-fifth part or

KEKEWICH J. 1902 OSBORNE AND BRIGHT'S, LIMITED, *In re.*

share thereof to his daughter Florence Catherine Tucker; another one-fifth part or share thereof to his daughter Margaret Ellen Lee; and the remaining one-fifth part or share thereof for the children of his deceased daughter Ada Margaret Lauder, who being a son or sons should attain the age of twenty-five years, or being a daughter or daughters should attain that age or marry; and he directed that the share of his daughters in his real and residuary personal estate should be held and retained by his trustees or trustee upon trust during the life of such daughter to pay the interest, dividends, and annual income to arise therefrom unto her during her life, without power to alien, assign, or otherwise anticipate the growing payments thereof; and from and after the decease of any of his four daughters above named, he directed that his trustees or trustee should stand possessed of the respective share of such daughter, and the investments, income, and proceeds thereof, upon trust for such person or persons, and in such parts, shares, and proportions, manner and form as each of such four daughters should, whether covert or sole, by any deed or deeds, or by will or codicil, direct or appoint; and in default of such appointment by any of his four daughters, and so far as such appointment if incomplete should not extend, then upon trust for her or their child or children or other issue, who being a son or sons should attain the age of twenty-five years, or being a daughter or daughters should attain that age or marry, which should first happen, for her or their own absolute use and benefit, and if more than one in equal shares. The will contained a gift over in the event of any of the daughters dying without issue, and without having exercised the power of appointment given to her. The testator authorized his trustees to sell and dispose of any portion of his real and personal estate, either by public auction or private contract, as they or he should think proper and beneficial.

The testator died on May 27, 1886.

On June 26, 1901, the trustees of the will contracted to sell certain leaseholds at Birmingham, forming part of the residuary estate of the testator, to Bright's, Limited, for 14,650*l.*

The testator's daughters Emily Sophia Vero, Florence

Catherine Ross (formerly Tucker), and Margaret Ellen Lee, were all living and had husbands living. Frances Mary Williams had died intestate, and without having exercised her power of appointment, but her husband and a son (her heir-at-law) survived her. There were five children of Ada Margaret Lauder, three of whom had attained twenty-five. The shares of Mrs. Vero and Mrs. Lee remained in settlement. It was stated, but not proved, that the share of Mrs. Ross had become absolutely vested under an exercise by her of her power of appointment.

On the investigation of the title the purchasers required that all the tenants for life of undivided shares should concur in the sale. The vendors were able and willing to procure the concurrence of Mrs. Vero, but found it to be impracticable or inconvenient to procure any other consents, and submitted that under s. 6, sub-s. 2, of the Settled Land Act, 1884, the consent of Mrs. Vero was sufficient.

The purchasers accordingly took out this summons under the Vendor and Purchaser Act, 1874, for an order declaring whether or not the power of sale given by the will to the trustees thereof was exercisable without the consent of any person or persons having regard to s. 56, sub-s. 2, of the Settled Land Act, 1882, and if any such consent was required then of whom, having regard to s. 6, sub-s. 2, of the Settled Land Act, 1884. (1)

(1) The material provisions of the Settled Land Acts, 1882 and 1884, are as follows:—

Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 5: "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Sub-sect. 6: "If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act."

Sect. 56, sub-s. 2, provides that "in cases of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the

KEKEWICH J.

1902

OSBORNE AND BRIGHT'S, LIMITED, *In re.*

It was admitted that the limitations in the will in favour of the children of the surviving daughters of the testator were void as transgressing the rule against perpetuities.

Prior, for the purchasers. There is here a conflict, within the meaning of s. 56, sub-s. 2, of the Settled Land Act, 1882, between the power of sale conferred on the trustees of the will and the statutory power vested in the tenants for life of the several undivided shares. The form of the settlement of the shares is, by reason of the gift to children being void for remoteness, similar in effect to that in *In re Pocock and Prankerd's Contract* (1); and that case shews that each of these ladies has the powers of a tenant for life within s. 58, sub-s. 1 (ix.), of the Act, and can make a title as such to a purchaser. Mrs. Vero, for instance, has the power to sell and convey one-fifth, notwithstanding that the legal estate is in the trustees. A sale by the trustees would destroy her power, and clearly, therefore, a case of conflict arises: *Earl of Lonsdale* v. *Lowther*. (2) Accordingly, under s. 56, sub-s. 2, the trustees cannot sell without some consent, and it is submitted that the consents of all the tenants for life, or persons having powers of a tenant for life, are necessary to the exercise by the trustees of their power under the will.

E. P. Hewitt, for the vendors. First, it is submitted that there is no case of conflict at all within the meaning of the Settled Land Acts. Sect. 56 provides that the consent of "the tenant for life" is to be necessary. It contemplates the existence of a tenant for life of the entirety. The statute does

---

trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act."

Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6, sub-s. 2: "In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act."

(1) [1896] 1 Ch. 302.

(2) [1900] 2 Ch. 687.

not apply so as to limit the powers of the trustees, unless there is a complete tenant for life. That is not the case here. Some of the shares are not in settlement at all, and the only tenants for life, or persons having the powers of a tenant for life, are beneficiaries of undivided shares.

Secondly, the vendors are willing to obtain the consent of one of the tenants for life, and it is submitted that under s. 6, sub-s. 2, of the Settled Land Act, 1884, the consent of one is sufficient.

Prior, in reply, on the second point. Sect. 6, sub-s. 2, of the Act of 1884 does not apply, because there are not here "two or more persons" who "together constitute the tenant for life." The settlements of the several shares are independent settlements, and the tenant for life under one of them has nothing to do with the tenant for life under another of them. [He referred also to *Cooper* v. *Belsey*. (1)]

KEKEWICH J., after referring to the terms of the will, continued:—For the present purpose it is sufficient to notice that the testator's daughters became tenants for life in possession of their shares with absolute powers of appointment by deed or will. The testator gave his trustees power to sell or dispose of his real and residuary personal estate, and they have purported to exercise that power of sale. The question is whether they can exercise the power, or whether, by reason of the provision in s. 56 of the Settled Land Act, 1882, they are bound to get the consent of some persons to the sale. It seemed good to the Legislature, in introducing the new code contained in the Settled Land Act, 1882, to provide for the case of conflict between the provisions of a settlement and the provisions of the Act. [His Lordship read sub-s. 2 of s. 56, and continued:—]

If the trustees were selling the share which has been settled in trust for Mrs. Vero—to take her case—for life, no doubt Mrs. Vero's consent would be necessary. The sub-section is strangely worded, and it seems to me that the first and second branches of it do not exactly fit together; but it is perfectly clear that the object of the sub-section was to maintain the

(1) [1899] 1 Ch. 639.

KEKEWICH J.
1902
OSBORNE AND BRIGHT'S, LIMITED, *In re.*

code of the Settled Land Act, 1882, and to provide that no power exercisable under a will shall in any way conflict—that is, interfere with—the exercise of the power conferred by the statute on persons beneficially entitled under the will. The first argument on behalf of the vendors is that here there is no conflict. It is said that there can be no conflict between a power given to trustees to sell the entirety, and the power of a tenant for life to sell his or her part or share of the estate. That there is a conflict as respects the particular part or share can hardly be denied, and I think that if authority were wanted to shew that it is supplied by the case which has been cited of *Earl of Lonsdale* v. *Lowther*. (1) But the main point on behalf of the vendors is that the sale of the entirety by the trustees does not conflict with a sale of the one-fifth part or share by Mrs. Vero, assuming her to be tenant for life. I think that this first contention is not well founded. This lady, on the assumption I am now making, is tenant for life of a share, and that share has been settled. No doubt she can sell the share under the Settled Land Act if she pleases, and so, as between herself and the purchaser, convert the beneficial interest under the will. It is perfectly competent to her to exercise that power under the Act. If, therefore, the trustees sell the entirety, they are depriving her of her power to sell the share. That immediately raises a conflict, and makes it necessary that she should be a consenting party to the sale by the trustees.

But then it is observed that the provision in s. 56 applies only where there is a "tenant for life," and that this lady is not a tenant for life, but is only a person having the powers of a tenant for life. That she is such a person is, I think, clear from *In re Pocock and Prankerd's Contract*. (2) Does the provision bear that meaning? [His Lordship read the second branch of s. 56, sub-s. 2, and continued:—] It does not say "tenant for life, or person having the powers of a tenant for life"; but the word "accordingly" does not imply that the powers of the Act are to prevail in the case specified and in no other case. The clause is brought in by way of

(1) [1900] 2 Ch. 687. (2) [1896] 1 Ch. 302.

illustration of the cases in which the first branch of the sub-section is to apply. Then it is said that there again it is only "the tenant for life" that is mentioned. There is a little obscurity in the language there; but the object of the section was to provide against conflict, so that when there are two powers, one dehors the Act and one under the Act, then the Act shall be called in, and the power dehors the Act shall not be exercised without the consent of the person having the power under the Act.

Then there is a further argument that, under s. 6, sub-s. 2, of the Act of 1884, only the consent of one tenant for life is necessary, and that Mrs. Vero's consent being obtained, it is not necessary to obtain the other consents. [His Lordship referred to the sub-section, and to the definition in s. 2, sub-s. 6, of the Act of 1882, and continued:—] It is said that Mrs. Vero and the other persons similarly interested are tenants in common, and, therefore, they together constitute the tenant for life, and the consent of one of them only is necessary. It seems to me that Mrs. Vero is not one of several persons who together constitute a tenant for life. She is simply tenant for life of one undivided fifth. She is not tenant for life of the entirety, nor is she one of several persons who are together tenant for life of the entirety. There is no person who is tenant in common with her of the undivided fifth. And the same is true of any other person in a similar position with respect to any other undivided share. Accordingly, I think that I ought to make an order declaring that the power of sale given by the will is not exercisable without the consents of the persons beneficially interested under the will who are tenants for life, or entitled to exercise the powers of a tenant for life, under the Settled Land Acts.

Solicitors: *Vallance & Vallance, for Herd & Nutt, Birmingham; Sandars & Harding, for J. C. Fowke & Son, Birmingham.*

C. C. M. D.

KEKEWICH J.

1902

Jan. 18.

In re FRITH.
NEWTON *v.* ROLFE.

[1896 F. 248.]

Administration—Trustees carrying on Testator's Business—Defaulting Trustee—Claim by Creditors of the Business—Indemnity.

Where a testator's business is carried on after his death by his trustees under a power in the will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter.

THE testator, H. J. Frith, at the date of his death in October, 1886, carried on business as a bootmaker at three shops in Westminster Bridge Road, King's Road, Chelsea, and High Street, Clapham, respectively.

By his will dated June 17, 1886, he appointed W. E. Rolfe, A. B. Ellis, and J. L. Fysh to be his executors and trustees, and he empowered his trustees to carry on all or any of his businesses with liberty to retain in any such business the capital employed therein at his death, and any further part of his estate which the trustees might think fit to employ therein, and he conferred upon the trustees the same powers as to the mode of managing and carrying on the same as if they were the absolute owners thereof. He also appointed Rolfe to be the general manager thereof.

From the date of the testator's death until the commencement of this action the trustees carried on the testator's business under the management of Rolfe with disastrous results.

In 1896 the testator's children, who were beneficiaries under the will, not being satisfied with the way in which the business was being carried on, commenced this action against the trustees for administration. By the judgment the usual accounts and inquiries were directed, and a receiver and manager of the business was appointed, and the business had since been carried on by the receiver and manager.

In the taking of the trustees' accounts Rolfe was found liable to the estate for a sum of 921*l.* 9*s.* 9*d.*, together with a further sum for costs; but the other trustees shewed clear accounts, subject to the payment of a certain sum to be set off against their costs.

Shortly after judgment in the action, Messrs. Wilkins & Denton, claiming to be creditors of the testator's business, applied for and obtained an order for an inquiry what debts and liabilities properly incurred by the defendants in carrying on the business of the testator since his death remained due to the applicants and the other creditors of the defendants, and by his certificate, made in pursuance of this direction, the master found that the debts so properly incurred were as set forth in the schedule to the certificate, which included the debt of the applicants. Messrs. Wilkins & Denton now took out a summons in the action, asking for payment to themselves and the other creditors of the business of the debts respectively found due to them by the certificate out of moneys standing to the credit of the action, with interest thereon from the date of the certificate.

P. O. Lawrence, K.C., and *Hon. M. M. Macnaghten*, for the applicants. The applicants are entitled to be indemnified out of the testator's estate on the principle of *Dowse* v. *Gorton* (1), by subrogation to the rights of the trustees who have been carrying on the business; and this right is not precluded by the fact that one of the trustees owes money to the estate, since the creditors of the business can sue, and can get execution against any one of the trustees.

Warrington, K.C., and *T. T. Methold*, for the plaintiffs. The applicants have no right to have recourse to the trust estate so long as any one of the trustees is indebted to the estate. Where a testator's business is carried on after his death by his trustees under a provision in the will, the right of the creditors of the business to stand in the shoes of the trustees is an equity granted to them by the Court of Chancery, over and above their personal right against the trustees, to avoid the

(1) [1891] A. C. 190.

KEKEWICH J.
1902
FRITH, *In re.*
NEWTON *v.* ROLFE.

injustice of the cestui que trust walking off with the assets which have been earned by the use of the property of the creditors; but, if the cestui que trust does not get that benefit, there is no injustice to be avoided: *In re Johnson* (1), per Jessel M.R. The point raised in this summons has not occurred in any reported case, but the principle on which the claim of the applicants is based does not arise because the beneficiaries have not had the full advantage of the carrying on of the business.

Church, for the trustees.

KEKEWICH J. This appears to me to be a question of the application of well settled principles to a state of facts which, so far as I know, has never yet been the subject of decision by the Court. The trustees of a trader's will have carried on his business and employed part of his estate therein under a provision in the will. The accounts have been taken, and it appears that two of the three trustees are clear, subject to certain payments to be set off against their costs; but the third trustee has not shewn a clear account. He has been found to be a defaulter, and a sum of 921*l.* 9*s.* 9*d.*, together with certain further sums for costs, is due from him to the estate. In the course of carrying on the testator's trade the trustees incurred debts, and of course those to whom they incurred the debts are entitled to sue them. But the question here is whether they are now entitled to rank against the trust estate by subrogation to the equities of the trustees, or any one of them, or whether that right is precluded by the fact that one of the trustees has been found a defaulter.

The general principle is well settled and presents no difficulty. In the administration of an estate where the testator's business has been carried on after his death, it frequently happens that the Court is asked for an inquiry who are the creditors of the business—i.e., the creditors of those by whom the business has been carried on—and the form of order has been settled and is to be found in Seton. The first question which has to be considered before directing that

(1) (1880) 15 Ch. D. 548, 553, 555.

inquiry, it being proved that the business has been carried on by the trustees, is whether it has been carried on under a power in the will, or whether it has been carried on under such circumstances that the Court must assume the consent of the creditors of the testator. I do not know whether under any other circumstances an inquiry can be directed, but those are the two states of facts under which an inquiry is generally asked for and directed. If the business has been properly carried on as against the general creditors, either because the testator has directed it or because the creditors have assented, then this inquiry as to the creditors of the business is directed, in the first instance, at their own risk, because it may turn out that there is nothing to be paid. But when the debts of the business have been ascertained, the only one point which has to be considered is whether the trustees' accounts are clear; and if they are clear, then the creditors of the business are entitled to be paid, and paid in priority to the creditors of the testator. There is one possible modification of that, and that is that there may be some money owing by the trustees to the estate, and the creditors may be willing to pay that in order to make the trustees' accounts clear; and in that case the creditors are entitled to an assignment of the equity to which the trustees succeed on clearing their accounts. The principle has been expounded in *In re Johnson* (1) and in *Dowse* v. *Gorton*. (2) It is true that in *Dowse* v. *Gorton* (2) the only question before the House of Lords was whether the creditors' right was limited to that portion of the assets which had come into existence, or had changed its form, since the testator's death, or extended to the whole estate; but that question involved the whole principle on which the right depends. That question was discussed by the Law Lords, and the judgment which is usually referred to on that is the judgment of Lord Macnaghten. There is no difference between that and the judgment of Sir George Jessel. They both say the same thing. The creditor has no right whatever against the estate, but he has a right to sue the trustee who has incurred the debt. If the trustee on his part has a clear account, and has

(1) 15 Ch. D. 548, 553, 555. (2) [1891] A. C. 190.

KEKEWICH J.
1902
FRITH, *In re.* NEWTON *v.* ROLFE.

a right of indemnity against the estate, the creditor is subrogated to that right, and for that purpose the creditor is allowed to intervene. He may sue the trustee, and he may claim the benefit of the indemnity to which the trustee is entitled out of the estate. If, on the other hand, the trustee is in default and has not got that right, then no doubt the creditor can get nothing, because he is relying on an equity which does not exist. That is true; but that does not seem to me to prevent the right of the creditors claiming in this case. They have a claim against the three trustees. Now, what is the position of the trustees? The indemnity to the trustees is not to the trustees as a body, but to each of the trustees. Each of them who has acted properly is entitled to be indemnified against the debts properly incurred by him in the performance of the trusts imposed upon him. The Court prevents a trustee from insisting upon that right unless he comes in with clear accounts; but if he comes in with clear accounts he is not the less entitled to be indemnified because he has a co-trustee who has run away with certain moneys. I am, of course, excluding the case where a trustee who has a clear account is responsible for a co-trustee who has not. If that were so, the trustee who has a clear account of his own would still be found liable to the trust estate, because he would have to make good that which the defaulting trustee owed to the estate. Apart from that case, a trustee who has a clear account is entitled to an indemnity for what he has done quite independently of the question whether another trustee has been found a defaulter or has committed a breach of trust. That is not a question which for this purpose a trustee with a clear account need go into. Look at it in another light. The creditor is entitled to sue all or any of the debtors. He may sue, and he may issue execution against, all three, or any two or any one of them. Why would it be fair to say that because he has a right against A. or against A. and B. he must not have it because C. is in default? That would be so if the right of A. depended on the right of C.; but I have already shewn that the right of A. does not depend on the right of C. Any one trustee acting properly is entitled to insist on his own indemnity. I have already anticipated the

practical view. Let me put it plainly. If I refuse this order the result will be, or may be, that one of these creditors will sue these two trustees, or one of them. Is it credible that, upon that trustee applying for an indemnity against the expenses which have been incurred by him in doing his duty, the Court would refuse that indemnity because his co-trustee owed money to the estate? It seems to me that that would be making use of the position to do something not only much less than equity, but grossly unjust. The applicants are, therefore, entitled to payment.

KEKEWICH J. 1902 FRITH. *In re.* NEWTON *v.* ROLFE.

Solicitors: *James, Mellor & Coleman; Bolton & Co.; Thomas Ingle.*

H. B. H.

HONYWOOD *v.* HONYWOOD.

BYRNE J. 1901 Dec. 16, 20.

[1862 H. 121.]

Settlement — Several Estates comprised in same Devise — Tenant for Life — Remaindermen—Interest on Charges—Current Rents and Profits—Insufficiency—Arrears of Interest—Subsequent Rents—Payment off of Charges.

Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life are applicable to liquidate arrears accruing during the same life tenancy: *Revel* v. *Watkinson*, (1748) 1 Ves. Sen. 93; *Tracy* v. *Viscountess of Hereford*, (1786) 2 Bro. C. C. 128; *Caulfield* v. *Maguire*, (1845) 2 J. & Lat. 141.

Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates: *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *In re Hotchkys*, (1886) 32 Ch. D. 408.

Upon principle, therefore, a tenant for life of several estates included in the same devise is liable, as between himself and the remaindermen, to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property.

PETITION.

William Philip Honywood by his will dated February 18, 1859, devised all his real estates to trustees upon trust to

BYRNE J. 1901 HONYWOOD v. HONYWOOD.

manage the same, and to allow his wife to occupy his mansion and all the lands and premises then occupied by him during her life or widowhood, and after the payment of all interest moneys due on any security or securities to pay out of the rents and profits of his real estates certain annuities therein mentioned which had long since ceased, and subject thereto to pay the surplus rents and profits of his real estates to his wife during her life or widowhood; and, subject to the foregoing trusts, the testator devised all his real estates to Philip Courtenay Honywood for life, with remainder to his first and other sons in tail, with remainder to the eldest and every other son of Sir Courtenay Honywood for life, with remainder to the first and other sons of such sons of Sir Courtenay Honywood in tail, with remainder to the testator's own right heirs; and, after certain bequests of furniture, the testator directed all other his personal estate to be converted into money by his trustees, who should stand possessed of the proceeds upon trust to pay his just debts and funeral and testamentary expenses, and subject thereto in augmentation of his real estates; and he appointed his trustees executors of his will.

The testator died on February 20, 1859; and upon his death his widow, Frances Emma Honywood, went into possession of the estates.

Different parts of the testator's estates were subject to several mortgages created by the testator, each mortgage containing a personal covenant to pay the money thereby secured.

In the year 1862 Frances Emma Honywood commenced the action of *Honywood* v. *Honywood* for the administration of the estate of the testator; and by an order dated May 28, 1868, she was appointed receiver, and she kept down the interest on the several mortgages above mentioned until her death, which occurred in January, 1895, whereupon the said Philip Courtenay Honywood became tenant for life of the estates devised by the will of the testator.

Upon the death of the said Frances Emma Honywood the different mortgagees instituted several actions for foreclosure or sale, and also seeking payment out of the testator's estate as creditors on the covenants contained in their respective mort-

gages. In these actions receivers were appointed, and such receivers received the whole of the rents of the estates which accrued subsequent to the death of Frances Emma Honywood, and applied them in discharge of interest; but the rents so received were insufficient to keep down the whole of the accruing interest on the mortgages.

The bulk of the testator's estates were sold under orders made in the above-mentioned mortgagees' actions, and the proceeds of sale were applied in discharge, not only of the principal moneys, but also of the arrears of interest due at the time of such payment. All the mortgages were thus fully discharged, and there remained a small part of the testator's estates which it was unnecessary to sell. Such part had been subject to a mortgage, but the mortgage affecting it had been discharged out of the surplus arising from the sale of other parts of the estates after paying off the mortgages affecting such parts.

Philip Courtenay Honywood had assigned his interest to the Eagle Assurance Company.

This petition was presented by the surviving trustee of the testator's will, and amongst other questions which arose on the hearing of the petition was the question whether the income which had arisen since the death of Frances Emma Honywood on certain funds in court, and the future income to arise therefrom, and the rents which had accrued on the unsold real estate since her death, and the future rents to accrue during the life of Philip Courtenay Honywood, could and ought to be applied in recouping to capital the amount which had been applied thereout in discharge of the arrears of interest which had accrued since the death of Frances Emma Honywood, the testator's widow.

Rowden, K.C., and *H. C. Hawkins*, for the trustees.

Levett, K.C., and *Beaumont*, for the persons interested in the capital. The life estate is to be treated as a whole, and, the mortgages having been paid off out of the proceeds of part of the estate, the tenant for life cannot sever the remaining part of the estate, but the subsequent income is liable to recoup the

BYRNE J. 1901 HONYWOOD v. HONYWOOD.

arrears of interest which have been paid out of capital: *Frewen* v. *Law Life Assurance Society* (1); *In re Hotchkys.* (2)

[They also referred to *Waring* v. *Coventry* (3); *Makings* v. *Makings* (4); *In re Baron Kensington.* (5)]

Norton, K.C., and *Quin*, for the Eagle Assurance Company, the assignees of the life interest. No doubt the tenant for life is bound to keep down the interest on existing mortgages, but he is not bound to do so after they have been paid off except in so far as he may have received rents during the time the mortgages were in existence. In the present case no rents were received by the tenant for life or the assignees. When the Court directed the sale in 1898 the arrears of interest then due were to the extent that the income was insufficient properly paid out of capital, and the income cannot now be applied in recouping that capital. Income can only be applied in payment of interest so long as it is interest. The principles laid down in *Tewart* v. *Lawson* (6), *Norton* v. *Johnstone* (7), and *In re Green* (8) apply to this case.

If the income is insufficient to keep down the interest on the mortgages, the tenant for life is not bound to pay it out of his own pocket: *Syer* v. *Gladstone.* (9) There is no equity to compel him to pay as against the next tenant for life.

[They also referred to *Lord Penrhyn* v. *Hughes* (10) and *Sharshaw* v. *Gibbs.* (11).]

T. A. Nash, for other parties.

Levett, K.C., in reply.

Cur. adv. vult.

Dec. 20. BYRNE J. Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents

(1) [1896] 2 Ch. 511.
(2) 32 Ch. D. 408.
(3) (1834) 2 My. & K. 406; 39 R. R. 230.
(4) (1860) 1 D. F. & J. 355.
(5) Ante, p. 203.
(6) (1874) L. R. 18 Eq. 490.
(7) (1885) 30 Ch. D. 649.
(8) (1888) 40 Ch. D. 610.
(9) (1885) 30 Ch. D. 614.
(10) (1799) 5 Ves. 99.
(11) (1854) Kay, 333.

are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy: see *Revel* v. *Watkinson* (1), *Tracy* v. *Viscountess of Hereford* (2), and the judgment of Lord St. Leonards in *Caulfield* v. *Maguire* (3), where he sums up the result of the earlier authorities.

Where, as in the present case, several estates are included in the same settlement, the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates: *Frewen* v. *Law Life Assurance Society* (4); *In re Hotchkys.* (5)

It appears to me upon principle that the tenant for life of several estates included in the same devise remains liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property.

It was argued that upon payment off out of corpus of principal, interest, and costs due in respect of the charges there was an end of the matter; and the tenant for life became as fully discharged in respect of arrears as though his life tenancy had come to an end. I am unable to accept this view. If instead of several properties a single property in mortgage were settled, and, the interest being in arrear in consequence of insufficiency of the rents to keep it down, a part of the property were sold, principal, interest, and costs due on the mortgage being then paid off out of the proceeds, I do not see any fair ground for holding that the tenant for life could claim as against the remaindermen to enjoy the rents and profits of the unsold property except subject to a liability to recoup out of such rents when and as received by him the amount of arrears accrued during his life tenancy. It is quite true that he would not be under any personal liability in respect of the arrears, but the rents received by him ought, so far as I can see, to remain liable

(1) 1 Ves. Sen. 93.
(2) 2 Bro. C. C. 128.
(3) 2 J. & Lat. 141.
(4) [1896] 2 Ch. 511.
(5) 32 Ch. D. 408.

BYRNE J. 1901 HONYWOOD v. HONYWOOD.

as between himself and the remaindermen to recoup amounts paid out of capital in satisfaction of arrears.

There is no express authority, so far as I know, on the point, the reported cases being cases where there has been default in keeping down interest, rents being sufficient. The cases referred to of *Tewart* v. *Lawson* (1), *Norton* v. *Johnstone* (2), and *In re Green* (3) appear to me to have little bearing upon the present question. They establish that where there is a trust created for payment of debts out of the income of a testator's estate, either by means of accumulation or otherwise, and the debts are in fact lawfully paid out of "corpus," the event not being provided for in the will, there is no equity on the part of the remaindermen to have the "corpus" recouped out of income. No question arose as to any equity which possibly might have arisen had there been arrears of interest not kept down.

I think, therefore, that the income which has arisen since the death of Frances Emma Honywood from the funds in court, and the future income to arise therefrom, and the rents and profits of the unsold real estate, are during the lifetime of the present tenant for life liable to be applied in the first instance in recouping to capital the amount of arrears of interest accrued during the same life tenancy.

Solicitors: *Burch, Whitehead & Davidsons; Sandilands & Co.; Hammond & Richards; Wood, Biggs & Nash, for H. M. James, Exeter.*

(1) L. R. 18 Eq. 490. (2) 30 Ch. D. 649.
(3) 40 Ch. D. 610.

G. M.

BOND *v.* BARROW HÆMATITE STEEL COMPANY.

FARWELL J.

1901

[1901 B. 2232.]

July 29; *Nov.* 27, 28, 29; *Dec.* 3.

1902

Jan. 18.

Company—Dividends—Loss of Capital—Profits available for Distribution—Expert Evidence—Preference Shares—Fixed Cumulative Dividend—Declaration—Directors' Discretion—Interest—Dividend—Profit—Fixed Capital—Circulating Capital—Realized Loss—Estimated Loss.

The question whether a company has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses.

In re National Bank of Wales, [1899] 2 Ch. 629, reported on appeal as *Dovey* v. *Cory*, [1901] A. C. 477, applied.

Although in some cases fixed capital may be sunk and lost, without precluding the payment of a dividend, circulating capital must be kept up, and (*semble*) there is no distinction in this respect between a realized loss and an estimated loss.

Lee v. *Neuchatel Asphalte Co.*, (1889) 41 Ch. D. 1, and *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, explained.

The distinction between the propositions "Dividends must not be paid out of capital" and "Dividends may only be paid out of profits" explained.

The common article requiring dividends to be declared by the directors applies to fixed cumulative dividends on preference shares, and the Court will not readily override the directors' discretion in relation thereto.

The meaning of the words "interest," "dividend," "profit," "fixed capital," and "circulating capital" discussed.

Leasehold iron ore mines held by a smelting company for the purpose of supplying themselves with ore are circulating capital.

WITNESS ACTION.

This was an action by preference shareholders to obtain payment of their fixed cumulative preference dividends.

The defendant company was incorporated in 1864 with a capital of 150,000*l.* This, having been increased, was subsequently reduced by North J., as reported in *In re Barrow Hæmatite Steel Co.* (1)

It now stood at 1,528,275*l.*, divided into 150,000 ordinary shares of 7*l.* 10*s.* each, 377 8 per cent. preference shares of 75*l.* each, and 50,000 6 per cent. preference shares of 7*l.* 10*s.* each.

(1) (1888) 39 Ch. D. 582.

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

The original articles of association provided as follows:—

Art. 41: "The directors may, from time to time, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, . . ."

Art. 42: "All new shares shall be offered to the members in proportion to the existing shares held by them, . . ."

Art. 43: "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital, except that it shall be lawful for the company in general meeting, by special resolution as aforesaid, to direct that the new shares shall have such priority in respect of dividends as it shall deem expedient."

Art. 95: "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares or stock."

Art. 96: "No dividend shall be payable except out of the profits arising from the business of the company."

Art. 97: "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the buildings and premises connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select."

Art. 101: "No dividend shall bear interest as against the company."

New articles were adopted in 1897, incorporating (inter alia) the resolutions creating the preference shares. They did not, however, affect the priority of the preference shares, and were not referred to in the judgment.

The 8 per cent. preference shares were created by resolutions of 1872 in these terms: "(1.) This company will agree to purchase from the Barrow Rolling Mills Company, Limited,

the two furnaces erected by that company, and the land purchased by them, and any other property of which the Rolling Mills Company may be possessed. (2.) The consideration for the purchase shall be the sum of 37,700*l.* in preference shares of this company, bearing interest at 8 per cent. per annum from the first January last, such preference shares to be issued to the present shareholders in the Rolling Mills Company in proportion to their holdings. (3.) The directors are authorized to issue preference shares to the amount of 37,700*l.* bearing interest at 8 per cent. per annum in perpetuity, for the purpose of carrying out the above arrangement. (4.) The holders of the above-mentioned preference shares shall be entitled to attend the general meetings of this company, but they shall not be entitled in virtue of such shares to vote, or to interfere in any way in the company's proceedings, nor shall they, in virtue of such shares, be eligible as directors of the company."

The 6 per cent. preference shares were created by resolutions of 1876 as follows: "(1.) The capital of the company shall be, and is hereby increased by the addition thereto of 50,000 preference shares of 10*l.* each, entitling the holder to a fixed dividend at the rate of 6*l.* per centum per annum on the amount for the time being paid up in respect of such shares." "(3.) The holders of the said new preference shares shall be entitled to a dividend thereon only after payment of the interest from time to time payable in respect of the mortgage and bond or debenture debts of the company, and after payment of a dividend at the rate of 8*l.* per centum per annum on the preference shares of the company, amounting to 37,700*l.* created by special resolutions passed and confirmed at extraordinary general meetings of the company in the year 1872; and in case in any year the net profits of the company shall not be sufficient for the payment in full of the dividends on such new preference shares, the net profits of any subsequent year shall (after payment thereout of interest on the mortgage bond or debenture debts of the company, and of dividends of the said 8*l.* per cent. preference shares) be applied in payment to the holders of the said new preference shares of the amount

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

by which the dividends of any previous year or years may have fallen short of the fixed rate of 6*l.* per cent." "(5.) The holders of the said new preference shares shall be entitled to attend the general meetings of the company, but they shall not be entitled, in virtue of such shares, to vote, or to interfere in any way in the company's proceedings, nor shall they, in virtue of such shares, be eligible as directors of the company."

The profit and loss account for the year 1898 shewed a balance described as "net profit for the year 1898" of 65,803*l.* 7*s.* 3*d.*, and out of this and a balance of 5799*l.* 11*s.*, brought forward from the previous year, the 8 per cent. preference dividend for 1898 and the 6 per cent. preference dividend for 1896 and certain other expenses chargeable to revenue were paid, 20,000*l.* was added to the existing 20,000*l.* reserve, making it 40,000*l.*, and 10,418*l.* 10*s.* was carried forward.

These were the last preference dividends paid, so that on May 30, 1901, when the writ was issued, there were two years' arrears on the 8 per cent. preference dividends and four years' arrears on the 6 per cent. preference dividends.

The profit and loss account for 1899 shewed a balance described as "net profit for the year 1899" of 89,018*l.* 17*s.* 6*d.*, and this sum plus the 10,418*l.* 10*s.*, minus 10,603*l.* 1*s.* 11*d.* spent on extensions and improvements, making a balance of 88,834*l.* 5*s.* 7*d.*, was carried forward pending the decision of the Court on an application for the reduction of capital below referred to.

The profit and loss account for 1900 shewed a profit balance of 157,605*l.* 12*s.* 11*d.*, which was provisionally brought forward, making, with the balance of 88,834*l.* 5*s.* 7*d.* from the previous year, a balance to the credit of profit and loss of 246,439*l.* 18*s.* 6*d.*

The plaintiffs, who were holders of both classes of preference shares, claimed a declaration that this amount and, if necessary, the 40,000*l.* reserve ought to be applied in payment of the two years' arrears on the 8 per cent. preference dividends, and subject thereto in payment of the four years' arrears on the 6 per cent. preference dividends.

The report for the year 1898 contained the following state-

ment: "The shareholders are aware, both from the balance-sheets themselves and the auditors' certificates which have accompanied them, that for some years past no depreciation has been written off the amounts at debit of land, buildings, works, fixed plant, and mining leases. The directors have carefully considered the matter, and having regard to the fact that many of these assets are more or less of a wasting character, they are of opinion that the time has arrived when a careful revision of their value should be made. It is, however, a subject which in all its bearings requires most mature consideration, and the deliberations of the directors are not sufficiently advanced at the present time for them to submit any recommendation to the shareholders."

Accordingly, in 1899, special resolutions were passed for reduction of capital; but the petition to confirm the reduction was dismissed by Cozens-Hardy J. (1) and by the Court of Appeal (2), on the ground that the alleged loss had not been proved, and by Cozens-Hardy J. also on the ground that the 40,000*l.* reserve and the 88,834*l.* 5*s.* 7*d.* then standing to the credit of profit and loss were applicable to make good loss of capital pro tanto.

Some of the present plaintiffs, who now claimed these sums under the contract created by the resolutions of 1872 and 1876, had opposed the petition, and it was contended that the present plaintiffs were therefore estopped by the judgment of Cozens-Hardy J. (1) As, however, the point was not raised by the pleadings, and there were other plaintiffs who did not appear on the petition, and as the questions raised in the present case were not argued before Cozens-Hardy J., this contention failed.

The plaintiffs called no evidence.

The defendants' witnesses proved a realized loss of capital to an amount exceeding 200,000*l.* arising on the surrender of certain leasehold mines acquired by the company for supplying themselves with iron ore, the pulling down of certain blast furnaces and the sale of certain cottages used in connection therewith, and a loss by general depreciation of the company's

(1) [1900] 2 Ch. 846. (2) [1901] 2 Ch. 746.

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

assets estimated at over 50,000*l*. A number of business men called as experts in steel and iron companies stated that in their opinion there ought to be no distribution of profits till these losses were made good, Sir David Dale, a director, F. W. Pixley, an accountant, and others stating that the company ought to charge depreciation before it got out its profits, and not vice versâ.

Jenkins, K.C., and *Kirby*, for the plaintiffs. The plaintiffs have by contract an absolute right to their fixed dividends out of any year's profits before any sum is carried to reserve, applied to replace lost capital, or carried forward. They are not confined to "profits available for dividend," as in *Fisher* v. *Black and White Publishing Co.* (1)

The resolutions of 1872 speak of 8 per cent. "interest," not "dividend," and although the resolutions of 1876 speak of a 6 per cent. "dividend" they define exactly the deductions that may be made from the profits before paying it, and say nothing about reserve or depreciation. As they contain no reference to art. 97 or any other article, they constitute an absolute contract to make the fixed payments. This contract resembles an income bond, of which the income must be paid in any event, or a contract to pay a fixed salary, which must be paid although the directors have power to alter ordinary salaries. If this is not so, the preference shareholders are at the mercy of the company.

Art. 95, which provides that the directors may declare a dividend in proportion to the shares, is clearly inapplicable to fixed dividends, which require no declaration: *Oakbank Oil Co.* v. *Crum* (2); *Dent* v. *London Tramways Co.* (3)

Again, fixed dividends require neither recommendation nor equalization, so that the reserve fund article (art. 97) is inapplicable. If the articles apply, they were altered pro tanto by the resolutions: *Campbell's Case* (4), and the alteration was, so far as necessary, confirmed by the incorporation of the resolutions in the new articles. Apart from the special contract, the

(1) [1901] 1 Ch. 174.
(2) (1882) 8 App. Cas. 65.
(3) (1880) 16 Ch. D. 344.
(4) (1873) L. R. 9 Ch. 1.

directors might no doubt apply profits to making good lost capital, but they are not bound to do so. They have not done so yet. They have merely created a reserve fund, which is not capital, but undistributed profits: *In re Bridgewater Navigation Co.* (1), and carried the rest of the profits forward. The whole amount ought, therefore, to be applied in payment of the fixed dividends.

Assuming, however, that the contract is subject to the original articles, the directors still ought to pay these dividends. The 200,000*l.* realized loss now alleged is a loss on fixed capital, namely, iron ore mines, blast furnaces, and cottages, and the 50,000*l.* estimated depreciation is presumably of the same nature. This does not preclude the payment of a dividend out of profit on revenue account: *Lee* v. *Neuchatel Asphalte Co.* (2); *Bolton* v. *Natal Land and Colonization Co.* (3); *Lubbock* v. *British Bank of South America* (4); *Verner* v. *General and Commercial Investment Trust* (5); *Wilmer* v. *McNamara & Co.* (6); *In re National Bank of Wales* (7), reported on appeal as *Dovey* v. *Cory* (8); *In re Kingston Cotton Mill Co.* (*No.* 2) (9).

[FARWELL J. It seems to be merely a question of what a prudent man would do under the circumstances. That is a matter of evidence in each case. Were not the iron ore mines analogous to stock-in-trade?]

No. They were a wasting asset which might be worked out without replacement by means of a depreciation fund: *Lee* v. *Neuchatel Asphalte Co.* (2); *Verner* v. *General and Commercial Investment Trust.* (5)

In *Dovey* v. *Cory* (8) the House of Lords, though disapproving the view of the Court of Appeal (7), that revenue losses may be thrown on capital, cast no doubt on the general proposition in *Verner* v. *General and Commercial Investment Trust* (5), that in considering the propriety of paying a dividend a loss of fixed capital may be disregarded.

(1) [1891] 1 Ch. 155; 2 Ch. 317.
(2) 41 Ch. D. 1.
(3) [1892] 2 Ch. 124.
(4) [1892] 2 Ch. 198.
(5) [1894] 2 Ch. 239.
(6) [1895] 2 Ch. 245.
(7) [1899] 2 Ch. 629.
(8) [1901] A. C. 477.
(9) [1896] 1 Ch. 331; 2 Ch. 279.

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

Butcher, K.C., and *Cassel*, for the defendants. (1) There is no such contract as contended. The word "interest" in the resolutions of 1872 is a misnomer for "dividend": *In re Sharpe* (2); *Henry* v. *Great Northern Ry. Co.* (3) The resolutions of 1876 imply that the fixed dividends are to be paid out of net profits, i.e., profits ascertained after a proper allowance for depreciation or loss. The deductions mentioned are the deductions from the net profits so ascertained. The preference dividends are in fact intended to be paid out of profits available for dividend, and not as a matter of course out of the amount standing to credit of profit and loss: *Fisher* v. *Black and White Publishing Co.* (4); *Davison* v. *Gillies* (5); *In re Ebbw Vale Steel, Iron and Coal Co.* (6) The resolutions, as construed by the plaintiffs, though not purporting to alter the articles, would give the preference shareholders special rights against the ordinary shareholders, take away the directors' discretion and power of management, and prevent the creation of a reserve fund. This is inconsistent with *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (7) and *Andrews* v. *Gas Meter Co.* (8)

A dividend requires a declaration: Lindley on Companies, 5th ed. p. 437. This is not a mere formality, but a matter of discretion and internal management with which the Court will not interfere: *Burland* v. *Earle.* (9) The declaration makes it a recoverable debt: *In re Severn and Wye and Severn Bridge Ry. Co.* (10) In *Dent* v. *London Tramways Co.* (11) the preference dividends were non-cumulative. In the present case they are cumulative, so that they must be paid in full before the ordinary shareholders can get a penny.

Again, the realized loss is on circulating capital, and cannot be disregarded in considering whether there are any profits available for dividend. Mining was not our main business, but

(1) Swinfen Eady, K.C., who appeared for the defendants, was raised to the Bench before their case was opened.
(2) [1892] 1 Ch. 154.
(3) (1857) 1 De G. & J. 606.
(4) [1901] 1 Ch. 174.
(5) (1879) 16 Ch. D. 347, n.
(6) (1877) 4 Ch. D. 827.
(7) (1882) 23 Ch. D. 1.
(8) [1897] 1 Ch. 361.
(9) [1902] A. C. 83, 95.
(10) [1896] 1 Ch. 559.
(11) 16 Ch. D. 344.

the mines were merely held for the supply of iron ore for our main business. They were, therefore, stock-in-trade, and the blast furnaces and cottages were merely ancillary. It is, therefore, for the directors as men of business to determine how the loss should be made good, and until a proper provision is made no dividend can be paid. The distinction between fixed and circulating capital is explained in Palmer's Company Precedents, 7th ed. Pt. I. at p. 538, and the proper method of ascertaining profits at p. 527. The quotation from McCulloch on the latter point was approved by Lord Blackburn in *Coltness Iron Co.* v. *Black*. (1)

Jenkins, K.C., in reply.

Cur. adv. vult.

Jan. 18. FARWELL J. The contention of the plaintiffs in this action is that they are entitled by contract to be paid a preferential dividend out of the balance to the credit of the profit and loss account in each year, and that the company cannot appropriate any part of that balance to reserve or carry over one shilling until they have been paid in full. There is no suggestion of want of bona fides on the part of the directors or of the company. The defendants contend that this is not the true construction of the special resolutions creating the preference shares, and that, if it is, the balance to the credit of profit and loss for any year is not necessarily such profits of the company as are properly applicable to dividend, but that if the Court is satisfied by the evidence that there have been ascertained losses and depreciations of capital assets exceeding the amount of the balances, these losses must be made good before any dividend can be paid. The first point depends on the construction of the original articles and the special resolutions creating the preference shares, for it is not contended that, if the preference shareholders have such contractual rights as they claim, the company can by subsequent special resolutions deprive them of those rights or of any part thereof.

Art. 43 provides as follows: [His Lordship read the article.] This article, in my opinion, provides that all new shares

(1) (1881) 6 App. Cas. 315, 329.

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

shall be subject in all respects to all the provisions of the articles, except only that dividends payable on new shares may rank in priority to, instead of pari passu with, ordinary shares. For this purpose it is necessary only to introduce modifying words in art. 95, and then the whole fasciculus of clauses relating to dividends (95 to 101) applies. It is argued that the provisions as to the declaration of a dividend do not apply to shares on which a fixed preferential dividend is payable. In my opinion this is not so. The necessity for the declaration of a dividend as a condition precedent to an action to recover is stated in general terms in Lindley on Companies, 5th ed. p. 437, and, where the reserve fund article applies, it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company, but the preference shareholders came in on these terms, and this argument does not carry much weight in an action such as this, where bona fides is conceded. The opposite conclusion might enable the preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance. Granted that it is a hardship to go without dividends for a time, this hardship presses more heavily on the ordinary shareholders who have to wait until the preference shareholders have received all arrears before they can get anything. It was urged that art. 97 providing for the reserve fund cannot apply to preference shares, because one of its objects is to equalize dividends; but I cannot see that the mention of one object which is not applicable is any reason for excluding those objects which are applicable, and which are really for the benefit of all the shareholders. On the articles as they stand, I have no doubt that the true construction is that which I have stated.

But it is contended that the special resolutions have created larger rights, and it was, in my opinion, competent to the company to alter art. 43 by those resolutions. Now, the 8 per

cent. preference shares were created by resolutions of 1872 in these terms: [His Lordship read the resolutions.]

In my opinion there is nothing whatever in this to alter any of the articles as I have construed them. Stress has been laid on the word "interest"; but in my opinion that word has slipped in per incuriam, and should be read as "dividend," as indeed is done when this resolution is referred to in the special resolutions of 1876, to which I shall have to refer presently. Interest is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance. Interest is compensation for delay in payment and is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of those profits. It is impossible, in my opinion, to give to the word, used as it is in this case, so pregnant a meaning as the plaintiffs desire, reading it as equivalent to an alteration of the articles and as creating a right overriding the valuable and possibly essential article providing for reserve funds.

The 6 per cent. preference shares present more difficulty. They were created by resolutions of 1876. [His Lordship read the resolutions.]

The third resolution is not very happily worded, but I have come to the conclusion that this and the first resolution read together are merely a verbose statement of a bargain that the holders of the 6 per cent. shares are to have a fixed 6 per cent. cumulative preferential dividend, subject to the rights of the debenture-holders and the 8 per cent. preference shareholders. I think that the words "only after payment, &c.," in the third resolution are restrictive words, equivalent to "subject to," and do not create new rights by rescinding the articles relating to declaration of dividends, creation of reserve fund, and the like. The only difficulty that I have felt has been created by the latter part of the third resolution, beginning "the net profits of any such year." I feel the difficulty of limiting the generality of the term "net profits"; but, on the other hand, it is only the arrears to which this provision applies, and it would be strange that the preference share-

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

holders should have to allow a reserve fund to be formed so far as their current year's dividend was concerned, but should be entitled to sweep up everything in respect of past arrears. I have come to the conclusion that the use of the words "net profits" is not sufficient to rescind the articles to which I have referred, but that the resolution must be read as subject to the provisions of those articles.

For the reasons that I have stated the plaintiffs' case fails. But another point has been taken by the defendants, and, as evidence has been adduced and considerable argument has been addressed to it, I feel bound to state the conclusion at which I have arrived with respect to it. The contention is that, even if the plaintiffs were right in their construction of the articles, the company could not legally pay them the dividends that they claim, because there are no profits properly so called out of which they can be paid, and that any such payment, if made, would be made out of capital. It has been proved to my satisfaction (and indeed the plaintiffs' counsel very properly admitted that they could not dispute that the result of the evidence was) that the company has sustained an actual ascertained and realized loss of capital to an amount exceeding 200,000*l.*, and has also lost capital by estimate and valuation to an amount exceeding 50,000*l.* The various sums claimed by the plaintiffs as available to pay their dividends amount to about 240,000*l.* If, therefore, these ascertained and estimated losses have to be made good before any dividend can properly be paid, there are obviously no funds out of which to pay dividends. The defendants allege and the plaintiffs deny that the company are bound to make good these losses before paying any dividend. The question is one of very considerable difficulty on the authorities, but the result of those authorities is, in my opinion, that there is no hard and fast rule by which the Court can determine what is capital and what is profit. "The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question": per Earl of Halsbury L.C. in *Dovey* v. *Cory*. (1) "It may be safely said

(1) [1901] A. C. 477, 486.

that what losses can be properly charged to capital, and what to income, is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ: see *Gregory* v. *Patchett*. (1) There is no hard and fast legal rule on the subject": per Lindley M.R. in *In re National Bank of Wales*. (2)

It is, however, necessary to bear in mind that the two propositions—(1.) that dividends must not be paid out of capital, and (2.) that dividends may only be paid out of profits—are not identical, but diverse. The first is the requirement of the statutes, and cannot be dispensed with; the latter is in Table A or the articles of the particular company, and is one of the regulations of this company which has to be construed. A company which has a balance to the credit of its profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account or to reserve, and if the assets subsequently increase in value the amount neither has been nor will be part of the capital. If, therefore, a part of that balance is used in paying a dividend, that dividend is not paid out of capital, because the sum has never become capital, although it still remains a question whether it has been paid out of profits or not. It has been pointed out by Lindley L.J. in *Lee* v. *Neuchatel Asphalte Co.* (3) that there is nothing in the statutes requiring a company to keep up the value of its capital assets to the level of its nominal capital. The requirement is merely negative, that dividends shall not be paid out of capital, and the balance to the credit of profit and loss account does not automatically become part of the capital assets because the value of the actual capital assets has depreciated to an amount equal to or exceeding that balance.

The real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of

(1) (1864) 33 Beav. 595. (2) [1899] 2 Ch. 629, 670.
(3) 41 Ch. D. 1, 22.

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

competent witnesses. There is no single definition of the word "profits" which will fit all cases. Take, for instance, Professor Marshall's definition ("Principles of Economics," vol. i. p. 142): "When a man is engaged in business, his PROFITS for the year are the excess of his receipts from his business during the year over his outlay for his business; the difference between the value of his stock and plant at the end and at the beginning of the year being taken as part of his receipts or as part of his outlay, according as there has been an increase or decrease of value." I am precluded from adopting this in its entirety by authorities which are binding on me, because in the definition "stock and plant" obviously include both fixed and circulating capital, as defined at p. 134 of the same treatise (1): see, for instance, the judgment of Lindley L.J. in *Verner* v. *General and Commercial Investment Trust* (2), where he says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up." I do not understand his Lordship to be laying down a general and universal rule that in every company fixed capital may be sunk and lost, but that there are companies in which that may be the case. All the authorities, however, agree, I think, that circulating capital must be kept up.

Now, in the present case the 200,000*l.* realized loss arises by the surrender of the leases of certain mines, by the pulling down of certain furnaces, and on the sale of certain cottages. The company is a smelting company on a very large scale, and for the convenience of its works and by way of economy they acquired the leases of the surrendered mines in order to supply themselves with their own ore instead of buying it as required. The ore was used exclusively for the purposes of the company's

(1) "Whether we use the term capital in its broader or its narrower sense, we may follow Mill in distinguishing CIRCULATING CAPITAL 'which fulfils the whole of its office in the production in which it is engaged, by a single use' from FIXED CAPITAL, 'which exists in a durable shape and the return to which is spread over a period of corresponding duration.'"

(2) [1894] 2 Ch. 239, 266.

works. The mines were drowned out and the cost of pumping them out was prohibitive. The company, therefore, surrendered the leases, pulled down the blast furnaces, and sold the cottages connected therewith. Now, the evidence before me is all on one side. The plaintiffs called none, and Sir David Dale and the defendants' other witnesses all agree that in a company of this nature these items ought to come into the account before any profit can be said to be earned, and my own opinion coincides with theirs, inasmuch as I think that the money invested in those items is properly regarded in this company as circulating capital. Suppose the company had bought enormous stocks of ore sufficient to last for ten years, it could hardly be said that the true value of so much of this as remained from time to time ought not to be brought into the balance-sheet, and I can see no difference in principle for the purpose of the account between ore in situ and ore so bought in advance. The blast furnaces and cottages are mere accessories to the ore, and resemble a building for housing the stores bought in advance already mentioned.

There is more difficulty about the remaining 50,000*l*. I think that the onus is on the plaintiffs to shew that it is fixed capital, and that in a company of this nature such fixed capital may be sunk or lost. They have not done this, and the evidence, so far as it goes, is the other way. But this is not an actual loss, but depreciation by estimate, and the plaintiffs really relied on *Lee* v. *Neuchatel Asphalte Co.* (1) as an authority for this proposition as a universal negative, namely, "that no company owning wasting property need ever create a depreciation fund." In my opinion, that is not the true result of the decision. It must be remembered that in that case there had been no loss of assets. The company's assets were larger than at its formation (2), and the Court decided nothing more than the particular proposition that some companies with wasting assets need have no depreciation fund. For instance, I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent, and distribute the whole of

(1) 41 Ch. D. 1. (2) 41 Ch. D. 15.

FARWELL J. 1902 BOND v. BARROW HÆMATITE STEEL COMPANY.

the receipts in respect thereof as profits without replacing the capital expended in the purchase. It is for the Court to determine in each case on evidence whether the particular company ought, or ought not, to have such a fund.

There is no doubt as to the opinion of the witnesses in this case, and, further, the opinion of the directors cannot be altogether disregarded. The Courts have, no doubt, in many cases, overruled directors who proposed to pay dividends, but I am not aware of any case in which the Court has compelled them to pay when they have expressed their opinion that the state of the accounts did not admit of any such payment. In a matter depending on evidence and expert opinion, it would be a very strong measure for the Court to override the directors in such a manner. I have made no distinction between the realized loss and the estimated loss, because the witnesses declined to recognise any such distinction, and also because the decided cases deal only with the distinction between floating and fixed capital, and do not distinguish between realized and estimated loss, and it would serve no useful purpose for me to express any opinion on the subject. The result is that the action fails, and must be dismissed with costs.

Solicitors: *Frederick Walker & Pettitt; Currey, Holland & Currey.*

G. R. A.

ANDERSON *v.* MIDLAND RAILWAY COMPANY.

BUCKLEY J.

1901

Oct. 26, 29.

[1901 A. 278.]

Railway Company—Tolls—Equality—Undue Preference—Ultra Vires—Shareholder—Action by Shareholder against Railway Company and Preferred Customer—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.

If a railway company carries goods for a customer at a lower rate than that charged to other customers, it may be an undue preference and give to other customers a right to complain before the Railway and Canal Commissioners, but it is not an act ultra vires the company, and it gives no right to a shareholder of the company to bring an action against the company and the preferred customer for an account and an order that the preferred customer should make good the deficiency, or for an injunction to restrain further preferences.

POINT OF LAW.

The plaintiff was a shareholder in the Midland Railway Company, and he brought this action, suing on behalf of himself and all other the shareholders of the company, against the company and Henry Wiggin & Co., Limited. By his statement of claim he alleged that the Midland Railway Company were, as a railway company, forbidden by law to give any undue preference in favour of or to prejudice any firm in regard to carriage of goods, and were required to charge tolls equally as regards all persons, and that any such preference, favour, inequality, or advantage was ultra vires the said Midland Railway Company; that the railway company by their fixed scale of rates charged more for goods described as nickel than for those described as metal; that the defendants H. Wiggin & Co. had been in the habit of sending by the Midland Railway large consignments of goods which ought to have been described as nickel but were described as metal; that the difference between the tolls they had paid and those which they ought to have paid had amounted for several years to 1000*l.* a year, and that the profits of the shareholders of the railway had been diminished by that amount; that upon such erroneous declarations being notified from the Railway Clearing House the

BUCKLEY J. 1901 ANDERSON v. MIDLAND RAILWAY.

railway company took no steps to enforce payment of the proper rate of charge, but permitted Henry Wiggin & Co. to continue to send goods by such incorrect descriptions, thus giving them an undue preference; that any agreement for that purpose was ultra vires the Midland Railway Company; and that by reason of such preference other consignors were entitled to claim reductions of the charges to them, and the company and its shareholders are deprived of their legitimate profits.

The plaintiff further alleged that Henry Wiggin & Co. were liable to account to the railway company for the proper charges for all consignments in respect of which false declarations had been made; and he claimed an account of all transactions between the defendant companies, an inquiry as to incorrect declarations made by Henry Wiggin & Co., and the amounts by which the payments for the goods so declared had been deficient; that Henry Wiggin & Co. might be ordered to pay to the railway company the amounts which should appear due on taking the account and inquiry; and an injunction to restrain the continuance of such transactions as aforesaid.

Both the defendants delivered statements of defence on the merits, and also submitted that the statement of claim did not disclose any cause of action against them. Orders were accordingly made under Rules of Supreme Court, Order XXV., r. 2, that the points of law thus raised should be set down for hearing and disposed of before the trial, and the questions now came on together for argument.

R. J. Parker, for H. Wiggin & Co. Even if the plaintiff can take proceedings against the Midland Railway Company, he has no cause of action against H. Wiggin & Co. His allegations of ultra vires and undue preference on the part of the railway company are inconsistent with his attempt to make us liable. If anything ultra vires has been done, it has consisted in charging other customers too much, not in charging us too little. If we are bound on an implied contract to pay the larger tolls, that would give the railway company a claim against us; but it would not give the plaintiff any right of action, nor would it be a fraudulent preference as against

another customer. In fact, there has been nothing ultra vires; there is no implied contract; the contract with us is valid, but other customers may have claims against the railway company.

Even if it is an undue preference we ought not to be made defendants. The plaintiff relies apparently upon s. 90 of the Railways Clauses Act, 1845, and s. 2 of the Railway and Canal Traffic Act, 1854, which he says provide for equality of tolls. That under those sections the illegality consists, not in charging one customer less, but in charging others more, is clear from the cases in which traders who have paid more than others have been held entitled to recover the difference. There is nothing in those sections to shew that an undue preference is ultra vires.

Sect. 90 applies only to carriage between the same terminals, and there is nothing in the statement of claim to shew that it touches this case: *Great Western Ry. Co.* v. *Sutton* (1); *Evershed* v. *London and North Western Ry. Co.* (2); *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) Sect. 2 of the Act of 1854, which forbids undue preference, refers, not to tolls, but to facilities for carriage; and by s. 3, any person complaining may apply to the Superior Courts. By s. 6 of the Regulation of Railways Act, 1873, this jurisdiction was transferred to the Railway Commissioners. By s. 8 of the Railway and Canal Traffic Act of 1888, all the jurisdiction of the Railway Commissioners is transferred to the Railway and Canal Commissioners, including tolls (s. 10); and they can award damages (s. 12). The railway company cannot sue us for undue preference; therefore the plaintiff cannot do so; and if he can take any proceedings it can only be by way of complaint to the Railway and Canal Commissioners: *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4)

The statement of claim does not allege that there was no difference in circumstances between the carriage of our goods and those of other customers, and there may be inequality of

(1) (1869) L. R. 4 H. L. 226.
(2) (1877) 2 Q. B. D. 254.
(3) (1885) 11 App. Cas. 97.
(4) 11 App. Cas. 97, 112.

BUCKLEY J. 1901 ANDERSON v. MIDLAND RAILWAY.

charge where the circumstances are different: *Pickering Phipps* v. *London and North Western Ry. Co.* (1), overruling *Budd* v. *London and North Western Ry. Co.* (2)

The only remaining point is the allegation in the statement of claim that we have declared our goods by a wrong description, that the railway company can recover the deficiency in the tolls from us, and that the plaintiff can insist on the railway company enforcing that claim. But if there is no question of ultra vires, the only cause of action against us by the railway company would be for deceit, and the directors are the only persons who can decide whether the action ought to be brought. It is not suggested that the plaintiff represents the majority of the shareholders; so he cannot sue except to restrain the company from acting ultra vires: Buckley on the Companies Acts, 7th ed. p. 522.

Ingpen, K.C., and *Sargant*, for the Midland Railway Company. The question whether we ought to bring an action against H. Wiggin & Co. is one for the governing body of our company to decide. The plaintiff cannot bring this action until he has exhausted all reasonable means of obtaining a remedy through the company, and this he does not allege that he had done: *Morris* v. *Morris*. (3) The railway company as common carriers have the right within certain limits to make different charges. A contract at a lower rate is good unless another customer in similar circumstances is charged more: in which case he can recover the difference from us, but there is nothing ultra vires.

[They adopted the arguments of H. Wiggin & Co.]

Gatey and *J. A. Compston*, for the plaintiff. We admit that the plaintiff's right of action against H. Wiggin & Co. depends upon whether what the railway company have done was ultra vires, and that is the only question for consideration now. He can sue them in contract for money owed to the company, and also in tort in an action for deceit. He is entitled to bring an action to restrain the railway company from acting ultra vires by carrying goods contrary to the terms of the statutes, and he

(1) [1892] 2 Q. B. 229. (2) (1877) 4 Ry. & Can. Cas. 393.
(3) W. N. (1877) 6.

can therefore bring an action against H. Wiggin & Co. The Acts say that everybody is to be charged at the same rate. The railway company can vary its rates from time to time, but equality must be maintained. Sect. 90 of the Act of 1845, which gives this power, shews that it is illegal and ultra vires to do it in any other way. A variation in favour of one person is a breach of the section and ultra vires: *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1) A shareholder may bring an action against his company in respect of an act which is ultra vires: *Simpson* v. *Westminster Palace Hotel Co.* (2) It is ultra vires the company to do anything which a statute forbids them to do, and s. 90 forbids them to do what they have done. The contract to carry goods for less than those of other customers is void altogether, although, so far as the railway company have actually carried goods for H. Wiggin & Co., they can claim payment from them.

[BUCKLEY J. I agree that if the railway company and H. Wiggin & Co. are joining in an ultra vires act you can ask for an injunction to restrain the railway company from doing so, and you can add H. Wiggin & Co. as defendants; but you must shew ultra vires.]

The fact that other customers acquire rights against the company does not make the act done less ultra vires; but it does give the plaintiff an additional cause of action. If a railway company directed its servant to commit an assault, that would be illegal and ultra vires, but the person assaulted would have a cause of action. Sect. 2 of the Act of 1854 is to the same effect. It is said that the jurisdiction under that Act has been transferred to the Railway and Canal Commissioners, and it may be that the customers could not sue in this Court; but the plaintiff is not a customer complaining and asking for damages within the Acts. Sect. 30 of the Act of 1888 shews that shareholders are not referred to in the Act: *Lancashire and Yorkshire Ry. Co.* v. *Greenwood & Sons.* (3) This Court has power under its ordinary jurisdiction to protect a shareholder from having his property applied to wrongful purposes.

(1) (1875) L. R. 7 H. L. 653. (2) (1860) 8 H. L. C. 712.
(3) (1888) 21 Q. B. D. 215, 217.

BUCKLEY J. 1901 ANDERSON v. MIDLAND RAILWAY.

BUCKLEY J. For the purpose of to-day, and for that purpose only, I have to assume that all the allegations in the statement of claim are true, and, assuming that they are all true, I have to see whether there is any cause of action disclosed.

The plaintiff is a shareholder in the Midland Railway Company, who professes to sue on behalf of himself and all other shareholders. He joins the company as a defendant, and he joins certain customers of the company, Henry Wiggin & Co., Limited, as co-defendants. The case which he alleges, quite shortly stated, is this: That the Midland Railway Company have tolls for the carriage of goods, including a toll for the carriage of goods falling under the head of nickel, and another toll for goods falling under the head of metal. The toll for nickel is higher than the toll for metal. It is alleged that Henry Wiggin & Co. consigned nickel for carriage by the Midland Railway Company and have declared their goods as being metal, and that they paid the lower charge—that for metal. Paragraph 9 is this: "Upon such erroneous declarations being notified from the Railway Clearing House to the said Midland Railway Company in respect of the defendants Henry Wiggin & Co., Limited, the said Midland Railway have taken no steps to enforce payment of the proper rate of charge, but have permitted the defendants Henry Wiggin & Co., Limited, to continue to send goods by such incorrect descriptions as aforesaid, and to pay the lower rate of charge as aforesaid, thus giving an undue and unreasonable preference and advantage in favour of the defendants Henry Wiggin & Co., Limited. The said Midland Railway Company's secretary has alleged that this course was taken under some special authority or arrangement, of the particulars of which the plaintiff has no knowledge. If such authority or agreement exists, it is ultra vires the Midland Railway Company." Pausing there, the plaintiff says that Henry Wiggin & Co. sent goods the proper charge for which was a certain sum, declared them to be in a different class, the charge for which was lower, and that the Midland Railway Company have taken no steps to enforce the payment of the higher charge. That is a plain

statement of a right of action alleged to reside in the Midland Railway Company, which of course, on principles well settled, must be asserted by the corporation, and not by an individual corporator, and it is in respect of that that a single corporator is professing to sue. Primâ facie that is wrong. Then he says that after being informed of what had taken place the railway company permitted the defendants Henry Wiggin & Co. to continue to send goods and to pay the lower rate of charge. That is an allegation that the Midland Railway Company, knowing that Henry Wiggin & Co. ought to pay the higher rate, allowed them to consign at the lower rate, and it says that that was an undue and unreasonable preference. As regards the latter half of the clause, paragraph 10 goes on thus: "By reason of such preference other consignors are entitled to claim reductions of the charges to them, and the company and its shareholders are deprived of their legitimate profits." The allegation here, therefore, is that, because the railway company have made to a particular customer a lower charge the result is that other consignors situate in like case are entitled to claim a reduction. It seems to me it is impossible to contend in that state of things that the act, which is said to give rise to rights in other people, can be an act which does not bind the corporation at all, and that, of course, is what is meant by ultra vires. According to the pleader's own statement it is not ultra vires, because his allegation is that by reason of the company having done the thing—inferring, therefore, that they could do and did do it, or in other words that it is not ultra vires—other people have acquired rights. It seems to me that there he has pleaded himself out of Court. Then paragraph 12 goes on thus: "The defendants Henry Wiggin & Co., Limited, are liable to account to the said Midland Railway Company for and to make good to them the proper charges for all consignments in respect of which such false declarations as aforesaid have been made." That must mean either one of two things. Either that when Henry Wiggin & Co. consigned nickel by a false description they entered into an implied contract with the Midland Railway Company that they would pay the

BUCKLEY J. 1901 ANDERSON v. MIDLAND RAILWAY.

charges for nickel, and when the company found out the truth, that it was nickel and not metal, that Henry Wiggin & Co. became liable to pay the larger sum—which would be an action on an implied contract; or that the Midland Railway Company was deceived by being induced to carry certain goods at a lower charge when in fact the goods were of a higher class, and they were entitled to a higher rate, and that they were entitled to damages for the deceit. In either of those two cases the right of action is the right of action of the corporation, and cannot be asserted by an individual corporator. It was very fairly admitted by Mr. Gatey, who appears in support of the pleading, that he cannot sustain the action at all except upon the ground of ultra vires. He does not dispute, and could not dispute, that an individual corporator cannot, on the allegations of this statement of claim, maintain a cause of action of the corporation only, and his case depends upon ultra vires. He says this, and truly, that under s. 90 of the Railways Clauses Act of 1845 and under s. 2 of the Act of 1854 and some later enactments, railway companies are compellable to treat their customers upon terms of equality. As regards s. 90 of the Act of 1845, it has been held that it applies only to consignors whose goods are carried from and to the same terminals over the same line of rails; s. 2 of the Act of 1854 is wider, and under that section equality is to be given as between customers of the railway company over different parts of the railway. Any breach of those provisions is what is known as an undue preference; and if there be a breach of those provisions, then the scheme of the Acts is that persons who are affected by them are entitled to go, not to this Court, because this Court has no jurisdiction in the matter, but to the Railway and Canal Commissioners, to lay the facts before them, and to insist that the provisions of the Acts of Parliament shall be complied with which provide for equal treatment of all customers. The plaintiff's case here is that there has been a breach of those provisions. Suppose there has, what is there that enables a shareholder in the company which has committed a breach to come and ask for relief against his company and the customers of his company

based upon that breach, upon the footing that it is ultra vires? It appears to me that there is no ground for that at all. The breach, if there be a breach, of the Act of Parliament is not one which gives rise to any rights as between the corporator and the corporation, but one which gives rise to rights as between the corporation and other customers of the corporation. There is nothing ultra vires in the act which is done by the corporation towards the particular customer of which the corporator can complain; it is an act of which other customers of the corporation may complain by proceedings taken by them before a tribunal different to this, and which will give rise to other remedies altogether different from those sought here.

This is not an action which can be brought by the plaintiff suing on behalf of himself and all other shareholders, except under circumstances which do not exist and are not alleged to exist here. There is, therefore, no cause of action shewn on the statement of claim. I hold that the points of law are well founded.

Solicitors: *Sharpe, Parker & Co., for Mathews, James & Crosskey, Birmingham; Beale & Co.; Hamlin, Grammer & Hamlin, for Clifford Dunn, Leeds.*

H. C. R.

BUCKLEY J.

1901

Nov. 8, 9.

1902

Jan. 21.

In re TRENCHARD. TRENCHARD *v.* TRENCHARD.

[1901 T. 926.]

Settled Land—Tenant for Life—Forfeiture Clause—Non-residence—Validity of Condition—Compromise—Sale of Tenant for Life's Interests—Investment—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 50, *sub-s.* 1; *s.* 51, *sub-s.* 1.

The testator gave his wife the use of his residence, Woodville, so long as she should desire to make it her permanent place of residence and should remain his widow, and directed that his estate should pay all rates, taxes, and outgoings in respect of the house and keep it in repair. He left his residuary real and personal estate upon trust for sale and conversion, and then for his children and their issue; the income of the shares of daughters to be paid to them during coverture without anticipation, and the capital of those shares to be divided after the daughters' deaths amongst their children. He directed his trustees to postpone the sale of Woodville, and to develop it as they thought fit. Byrne J. decided that the widow had the powers of a tenant for life under the Settled Land Act, 1882, and would not forfeit the benefits given by the will if she sold or leased the property. It was now proposed that she and the trustees should enter into a compromise whereby she should release to them her claims in respect of Woodville in consideration of an annual payment of 275*l.* during widowhood—a sum less than the estimated value of her interests under the will:—

Held, that, under s. 51, sub-s. 1, of the Settled Land Act, 1882, the condition as to residence was void only so far as it tended to prevent the exercise of the powers of the tenant for life; that there was nothing to prevent the widow from releasing her beneficial interests in the manner proposed; that if she did so she would forfeit those interests by ceasing to reside, but would receive the value of them in the shape of the annuity of 275*l.*; that no question of improper investment arose, as the real result of the transaction would be to relieve the testator's estate from part of the payments to which it was subject; and that the compromise was for the benefit of all parties, was within the power of the trustees, and ought to be sanctioned.

In re Haynes, (1887) 37 Ch. D. 306, followed.

E. P. TRENCHARD by clause 3 of his will gave to his wife "the use of my residence Woodville aforesaid so long as she shall desire to make it her permanent place of residence and shall remain my widow, my estate to pay all rates, taxes, and outgoings in respect thereof, and to keep the house and grounds

in tenantable repair." By clause 4 he gave her while she should reside in the house the use and enjoyment of all the effects therein free of liability for wear and tear, and upon her ceasing to reside he gave to her, to the extent of 300*l.* in value, such of the said effects as she should select. The testator devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust to call in and convert the same and pay debts and legacies, and to stand possessed of his said residuary trust moneys and the income thereof upon trust equally for his children living at his death and the issue of any child who should have predeceased him, who being males should attain twenty-one, or being females should attain that age or marry; and he declared that the interest of any daughter who should survive him should be held upon trust to pay to her during her life, without anticipation during any coverture, the income arising from her share, and after her death to divide the capital equally among her children. He also directed his trustees to postpone the sale of his Honor Oak estate (which included Woodville House) until after the death or marriage again of his wife, and he empowered them from time to time as they should think fit to develop the same estate, and for that purpose to use such part of his estate as they might deem advisable and raise money by mortgage.

The testator died on April 3, 1899. The widow took possession of Woodville and resided there; but, finding that it was larger than she required, and that there were difficulties connected with the management, repairs, outgoings, and development of the property, she asked the trustees to come to some arrangement about her interests under her husband's will. Questions arose, and a summons was taken out by one of the trustees on which, on July 26, 1900, Byrne, J. made an order declaring that Mrs. Trenchard had the powers of a tenant for life under the Settled Land Acts in respect of Woodville and the ground occupied therewith, and that she would not forfeit the benefits conferred upon her by the direction in the will to pay rates and expenses or the use of the furniture by selling or leasing the house under those powers.

BUCKLEY J. 1902 TRENCHARD, *In re.* TRENCHARD *v.* TRENCHARD.

All the persons interested desired that the estate, which was freehold, should be developed for building purposes, and Mrs. Trenchard wished the trustees to have the control of this scheme. She estimated her interest in the rental value of Woodville, together with the rates, taxes, and outgoings, at 350*l.* a year, and offered to release her claims under clause 3 of the will to the trustees in return for a fixed payment of 320*l.* a year. A compromise was agreed to between her and the trustees, and a summons was taken out by her to decide whether the trustees had power with the sanction of the Court to enter into an arrangement by way of compromise for the payment to her of a fixed annual sum in satisfaction of her claims under clause 3 of the will; and, if the Court should be of opinion that the trustees had power to enter into such an arrangement, that an agreement to pay to her a fixed sum of 275*l.* per annum during widowhood by way of compromise of the whole of her claims under clause 3 of the will might be approved by the Court; or, if the compromise should not be approved by the Court, that Woodville might be let or sold, and the trusts thereof administered.

The testator left three sons, who with a Mr. Ward were executors and trustees, and two daughters. The daughters were married and had infant children.

The summons came on for hearing on November 8, 9, when his Lordship, being of opinion that the testator's daughters and their children ought to be made parties, directed that they should be brought before the Court. They were added as defendants, and the summons came on again for argument on January 21.

Astbury, K.C., and *J. Bradford*, for Mrs. Trenchard. The trustees have power to enter into this compromise, and we ask the Court to sanction it. It is obviously for the benefit of all the persons interested; but a doubt has been suggested whether Mrs. Trenchard will not by giving up her interest forfeit all her rights, and whether that is not equivalent to saying that she has nothing to assign. We submit that the condition imposed by the testator as to residence is void altogether, and

that Mrs. Trenchard may give up residence without forfeiting anything.

Byrne J. has held that she has the powers of a tenant for life, and can exercise them without losing her rights; but his Lordship did not decide this point, and the condition is void under s. 51, sub-s. 1, of the Settled Land Act, 1882, which applies to limited owners who have the powers of a tenant for life as well as to actual tenants for life.

[BUCKLEY J. It is only void so far as it tends to induce the tenant for life not to exercise her powers under the Act. In other respects the condition is binding.]

This condition defeats her estate, and tends to induce her to abstain from exercising her power of sale, and it is therefore void: *In re Paget's Settled Estates* (1), followed in *In re Ames* (2), *In re Eastman's Settled Estates* (3), and *In re Smith.* (4) It is true that in *In re Haynes* (5) North J. held that such a condition was valid on the ground that it could not tend to defer a sale; but that case has never been followed, and must be taken to have been overruled: Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. pp. 382–3.

[BUCKLEY J. I do not think *In re Haynes* (5) is inconsistent with the other cases which have been referred to. If Mrs. Trenchard voluntarily ceases to reside she will forfeit her rights. The trustees propose to buy her estate; there is nothing to prevent her from selling her interest.

That is sufficient to support this compromise; the trustees can enter into it under s. 21 of the Trustee Act, 1893, and the Court has power to sanction it. Apart from the Settled Land Act there would be no difficulty, except that two of the shares are settled and there are infants. The ordinary jurisdiction to sanction it cannot be interfered with by a side issue arising under the Settled Land Act: *In re New.* (6)

W. M. Hunt, for the two daughters and their infant children, said that the compromise was beneficial to them and they did not oppose it, although they were not in a position to consent.

(1) (1885) 30 Ch. D. 161.
(2) [1893] 2 Ch. 479.
(3) W. N. (1898) 170 (15); 68 L. J. (Ch.) 122.
(4) [1899] 1 Ch. 331.
(5) 37 Ch. D. 306.
(6) [1901] 2 Ch. 534.

BUCKLEY J. 1902 TRENCHARD, *In re.* TRENCHARD *v.* TRENCHARD.

E. Clayton, for the trustees. So far as the trustees are beneficially interested they agree to the compromise, but they doubt whether as trustees they have power to enter into such a compromise, or whether the Court can sanction it. Mrs. Trenchard can sell the property as tenant for life, but she has no interest of her own to sell for the purposes of this compromise. The proviso that she is to lose her interest if she ceases to reside is, apart from s. 51, sub-s. 1, of the Settled Land Act, 1882, perfectly good. If she ceases to reside for any reason other than the exercise of her statutory powers she forfeits her interest, and it passes into the testator's residuary estate: *In re Haynes*. (1) The proposed release is perfectly voluntary on her part, and the trustees are therefore buying nothing. The compromise proposes to give her, after her interest has ceased in this way, an equivalent at the expense of people who are not sui juris—daughters who are restrained from anticipation, and infants who cannot consent to the scheme. Such an application of the trust funds is not within the trustees' power of investment. This is really a compromise of her rights and powers as tenant for life, and is forbidden by s. 50. Therefore the trustees will not be allowed to carry out this scheme.

Under s. 21, sub-s. 3, of the Trustee Act, 1893, the Court cannot sanction a compromise which is directly opposed to the testator's wishes. He has clearly expressed his intention that Mrs. Trenchard shall have nothing if she ceases to reside.

BUCKLEY J. The testator in this case by the third clause of his will, dated November 20, 1897, gave his widow the use of his house so long as she should desire to make it her residence and should remain his widow. The applicant upon this summons, who is his widow, has argued that the provision as to residence contained in this gift is, by s. 51 of the Settled Land Act, 1882, to be deemed void, and that she is entitled during widowhood whether she reside or not. In my opinion, this is not so. Sect. 51 of the Settled Land Act, 1882, does not enact that a provision such as this shall be void, but that

(1) 37 Ch. D. 306.

as far as it tends to induce the tenant for life not to exercise the power under the Act it shall be void. It is in the words "as far as" that, in my opinion, the solution of the question lies. Residence may cease upon sale under the powers of the Act and consequent delivery of possession to a purchaser, or may cease upon cesser of residence irrespective of sale. Complete effect is given to s. 51 if the provision be deemed to be void in the first case, but not in the second. Suppose a disposition of property in favour of A. B. during life or widowhood with a gift over in case of failing to reside, followed by a proviso that for the purposes of the gift over cesser of residence upon sale shall not be deemed a cesser of residence, and suppose a power of sale given to A. B. with an interest for life or widowhood in the proceeds of sale. Such a provision would not tend to induce the tenant for life not to sell. On the contrary, it would rather induce a sale. If she sold she would be entitled to the income of the proceeds of sale discharged from the obligation of residence. I see no reason why there should not consistently with the Act coexist a valid gift over in the event of ceasing to reside voluntarily and not upon a sale. It seems to me that that is the joint effect of this will and of the Act. In the present case Byrne J., by an order of July 26, 1900, has declared that the widow has the power of a tenant for life under the Settled Land Act, and that she will not forfeit the benefits given her by the will by selling under such power. In other words, she can sell; and if she sells she will be entitled as against the proceeds of sale to the same annual benefit (which must then be represented by money) as if she had not sold. This follows the decisions of Pearson J. in *In re Paget's Settled Estates* (1), of North J. in *In re Ames* (2), and of North J., again, in *In re Smith.* (3) The result of s. 51 is that the provision, as far as it is a fetter upon the power of sale, is void; and under sub-s. 2 of that section a new estate is given to the beneficiary by virtue of the statute extending to a like interest in the proceeds of sale. But this having been ensured, the words "as far as" in s. 51

(1) 30 Ch. D. 161. (2) [1893] 2 Ch. 479.
(3) [1899] 1 Ch. 331.

BUCKLEY J.
1902
TRENCHARD, *In re.*
TRENCHARD *v.* TRENCHARD.

are satisfied; and if there be a voluntary cesser of residence apart from sale, there is no reason why the testator's disposition should not have effect, inasmuch as that provision does not tend to induce the tenant for life not to sell. This was the decision of North J. in *In re Haynes*. (1) It was argued that the decision of Romer J. in *In re Eastman's Settled Estates* (which is to be found in *Weekly Notes*, (1898) p. 170, and 43 Sol. J. 114, but of which the best report is in 68 L. J. (Ch.) 122) is inconsistent with this view. In my opinion, that is not so. The form of the summons is stated in the *Law Journal Reports*—it did not go to the question of what the rights of the widow would be if she voluntarily ceased to reside apart from sale. The question whether the provision for the reduction of the annuity was void under s. 51 was raised in connection with the question whether the applicant was entitled during widowhood to the income arising from the proceeds of sale. That question, as it seems to me, is the only question which the learned judge answered. He did not decide that if she voluntarily ceased to reside the reduction of the annuity would not take effect. In my judgment, therefore, the applicant in this case is not entitled to an interest during widowhood discharged from the provision as to residence. But if she sells, and therefore ceases to reside, she will, by virtue of s. 51 of the Act of 1882, be entitled as against the income of the proceeds of sale to the same benefits as if she had not sold.

Under these circumstances the question is whether the trustees can compromise her rights in the manner proposed. The summons asks, first, as to compromise; and, secondly, in default of a compromise, that the house may be let or sold. The attitude of the applicant, as I understand it, is this. She says, "I have a beneficial interest in this house, and I propose to keep it by either continuing to reside there, or exercising my right of selling under the Act of Parliament, and thus acquiring a beneficial interest in the proceeds measured by the benefit given to me by the will." Under s. 50 she cannot release or assign her powers of sale; but there is nothing in the Act to

(1) 37 Ch. D. 306.

prevent her from making any arrangement she pleases for disposing of her beneficial interest in this house. The nature of the compromise is this. The pecuniary benefit given to her by clause 3 of the will is at present about 350*l.* a year, which is measured by the rental value of the house in which she is entitled to live rent-free, and the rates, taxes, and other outgoings, which the trustees are bound to pay. She says, "I am willing to take in exchange for that 275*l.* a year. Pay me something less than the amount I am entitled to under the will, and I will give up my right to reside in the house." If that offer is accepted, and she goes out of residence, her estate ceases, but she has been paid for it by a sum payable annually. The sale of her interest must be either good or bad. If it is good, she loses her interest in the house, but she keeps the purchase-money; if it is bad, there is no forfeiture, and she resumes her right of residence and her powers of sale. She only goes out of residence because she is paid the value of the right. She sells something of which she is the owner, and she gets its value. It is argued for the trustees that this is an investment of money belonging to married women and infants, and is a misapplication of their funds. That argument seems to me to be fallacious. This is not an investment of their funds; at present the estate is subject to a payment of about 350*l.* a year; in future it will be liable to pay 275*l.* In fact, the beneficiaries are receiving something; they are not paying anything. They pay something less than before, and to that extent get a benefit. The widow gives up something; but she obtains this benefit—that she is no longer obliged to reside in a certain house. The trustees get this benefit—that they are relieved from the difficulty in which they have been placed from the circumstance that the widow might have continued to reside, and thus have interfered with the building scheme; or she might have sold the house under her statutory powers, and yet retained her interest in the proceeds of sale. It seems to me that this is a fair compromise for all parties, and I declare that it is within the power of the trustees to enter into it, and I sanction it accordingly.

Solicitors: *Harston & Bennett; Ward, Perks & McKay.*

H. C. R.

JOYCE J.

1901

Dec. 6.

CHARRINGTON & CO., LIMITED *v.* CAMP.

[1901 C. 3715.]

Practice—Receiver—Public-house—Licences in Jeopardy—Recovery of Possession—Disputed Title—Receiver of Licences and of Rents and Profits—Landlord and Tenant—Breach of Covenant—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

The defendant was tenant of a public-house under an agreement, dated in 1893, whereby the plaintiffs agreed to let and the defendant to take the premises for one year certain. Under the agreement the defendant was not to do, or cause or suffer to be done, any act, deed, or thing whereby the licences might be jeopardized, suspended, forfeited, or lost; he was, upon quitting the premises, to assign over the licences to the plaintiffs; and he was to reside on the premises, and not to shut them up, or cause or suffer the same to be shut up, or the trading thereon to be suspended. It was thereby also agreed that if the tenant should commit any breach of the agreement, or the licences should be jeopardized, the tenancy should cease, and the landlords should have power at once, without notice or legal proceedings, to re-enter upon the premises and resume possession thereof. The defendant continued tenant upon the terms of the agreement until November, 1901, when he closed the house and went away.

In an action for recovery of possession and for a receiver, the Court appointed a receiver of the licences and of the rents and profits, ordered the licences to be handed over to the receiver, and gave him possession of the premises so far as was necessary for the purposes of preserving the licences.

MOTION.

By an agreement in writing dated September 8, 1893, the plaintiffs, who were brewers, agreed to let and the defendant agreed to take The Princess Royal public-house from September 14, 1893, for one year at the annual rent of 84*l.*, subject to the covenants and conditions thereinafter contained. The tenancy was determinable on three months' notice by either party. The defendant covenanted with the plaintiffs that he would not do, or cause or suffer to be done, any act, deed, or thing whereby the licences to the public-house or any of them might be jeopardized, indorsed, withheld, suspended, forfeited, or lost, but would duly renew the same from time to time; that he would reside in the said public-house and

premises, and would not shut up the same, or suffer or cause the same to be shut up or the trading thereon to be suspended, except during the period required or allowed by law; and that he would upon quitting the premises assign over all licences belonging thereto to the landlords, or to such person or persons as either of them might appoint, and would give all such notices and take all such steps as might be necessary or proper for the purpose of procuring the transfer of the same. The agreement further provided that the tenancy should determine and the plaintiffs should have power to re-enter upon and resume possession of the premises without notice or legal proceedings, and to plead the said agreement as their leave and licence for so doing if the defendant committed any breach of the agreement, or if the licences should become jeopardized, indorsed, withheld, suspended, forfeited, or lost.

The defendant continued in possession of the premises upon the terms of the agreement until November, 1901, when he closed the house and went away.

On November 6, 1901, the plaintiffs served the defendant with a three months' notice to quit. On November 20, 1901, the defendant wrote to the plaintiffs requesting them not to send the beer as ordered, as he had received a notice from the Inland Revenue re the licence, and stating that as he was not able to pay it he was closing the house.

On November 25 the plaintiffs commenced this action against the defendant to recover possession of the premises, for the appointment of a receiver of the rents and profits thereof and of the licences belonging thereto, and for arrears of rent.

On November 26, on the ex parte application of the plaintiffs, an interim order was made appointing a receiver of the licences and of the rents and profits of the public-house. Under this order the receiver went into possession.

The plaintiffs now moved for the appointment, until judgment or further order, of a receiver of the rents and profits of, and of the licences belonging to, the said public-house and premises, and for the delivery over of such licences to the receiver, and that the receiver might be at liberty to appoint a

JOYCE J.
1901
CHARRINGTON & Co., LIMITED, v. CAMP.

proper person to reside upon the premises and hold the licences under his supervision.

The defendant filed an affidavit in which he alleged that he had purchased the fixtures and fittings upon the premises from the plaintiffs at the price of 300*l*. He further alleged that the business had always been carried on at a loss, and that the business and the stock-in-trade and effects thereof were his absolute property.

Sebastian, for the plaintiffs. The object of the application is to secure the preservation of the licences. For this purpose it is necessary for the receiver to be put in possession of the premises and in receipt of the rents and profits. The defendant has broken his agreement. He has covenanted that he will on quitting the premises assign over the licences to the plaintiffs. There is ample jurisdiction to appoint a receiver in such a case, where defendant is in possession and pending a dispute: *Foxwell* v. *Van Grutten* (1) and *John* v. *John*. (2) In *Gwatkin* v. *Bird* (3), an action for the recovery of leaseholds, a receiver of the rents and profits was appointed. In *Berry* v. *Keen* (4) it was held that the Court has power, under the Judicature Act, 1873, s. 25, to appoint a receiver where the title to the property is disputed. In *Ind, Coope & Co.* v. *Mee* (5) possession was given to a receiver and manager of licensed premises.

Boome, for the defendant. No notice of the breach of any covenant has been given by the plaintiffs to the defendant, as required by s. 14 of the Conveyancing and Law of Property Act, 1881. The right of re-entry or forfeiture is not enforceable by action unless notice of breach is given, and the covenantor has had an opportunity of remedying the breach; and that notwithstanding any stipulation in the lease to the contrary.

The Court will not appoint a receiver in such a case as this.

In *Gwatkin* v. *Bird* (3) there were sub-lessees, and there was something to receive. In *Foxwell* v. *Van Grutten* (1) and *John* v. *John* (2) the title to the property was in dispute.

(1) [1897] 1 Ch. 64.
(2) [1898] 2 Ch. 573.
(3) (1882) 52 L. J. (Q.B.) 263.
(4) (1882) 51 L. J. (Ch.) 912.
(5) W. N. (1895) 8.

To appoint a receiver of the licences would be to appoint a receiver of the business of which they form part. No such order has ever been made.

The relation of landlord and tenant exists between the plaintiffs and the defendant, and the defendant is plainly a lessee within the meaning of the Conveyancing Act, 1881.

Sebastian, in reply. Sect. 14 of the Conveyancing Act does not, even as extended by s. 5 of the Conveyancing Act, 1892, apply to a mere tenancy agreement like this: it applies only to leases. There is not here even an agreement for a lease.

Where the Act is intended to apply to agreements, there are express and appropriate enactments: s. 18, sub-s. 17.

JOYCE J. (after stating the facts). It was contended on behalf of the defendant that the plaintiffs cannot possibly succeed in the action, because they had given no notice to him under the 14th section of the Conveyancing Act, 1881. Counsel for the plaintiffs has drawn my attention to the terms of that section and the other sections in the Act, and also to the terms of the 5th section of the Conveyancing Act, 1892; but although I am not prepared to say what the Court may determine about that on the trial, or that the plaintiffs will necessarily and certainly succeed in their action, as an action for recovering possession at the trial, yet I see a strong probability of it.

That being so, and the licences being at stake, and the defendant having shut up the house and gone out, what am I to do? The Court has jurisdiction to make orders—a jurisdiction which it had not before the Judicature Act—for the preservation of property pending dispute, and to appoint receivers where it is just and convenient and when the property is in danger. Now, the really valuable thing in dispute, the subject of this action, consists of the licences. Those licences are all-important to the property, and it is all-important to the plaintiffs that those licences should be preserved, if they are going to recover at the end of the term or at the trial. The defendant has no object in preserving them, being, as I strongly suspect, not unwilling that they should be

JOYCE J. 1901 CHARRINGTON & Co., LIMITED, v. CAMP.

destroyed; and he has moreover committed a most flagrant breach of the terms on which he held the property. That being so, what I intend to do is to make such an order as will preserve those licences pending the dispute. I do not want to do more than that, and that is what I intend to do so far as I can. I think that the interim order was quite right in appointing a receiver of the licences, and in directing them to be handed over to the receiver.

The receiver is in possession under the ex parte order. The defendant is in the wrong in shutting up the house and going away, and, if it be necessary for the preservation of those licences that the receiver should have the rents and profits or possession of the premises, then I am prepared to give it to him; but I only give it to him on the footing of its being necessary for the purpose of preserving the licences. I am assured by counsel that it would be impossible to maintain the licences without it. I shall, therefore, give him possession, but only for the purpose of preserving the property as a licensed property. The defendant will be at liberty, with the consent of the plaintiffs, to return to the house and remain there, so long as he does not interfere with the possession of the receiver.

Solicitors: *Loxley, Elam & Gardner; Clifford Turner & Co.*

G. A. S.

In re HELYAR.
HELYAR *v.* BECKETT.

[1901 H. 1580.]

JOYCE J.

1901

Dec. 12, 13, 14, 17, 18.

Settled Land—Infant Tenant for Life—Possession during Minority—Guardian—Trustee—12 *Car.* 2, *c.* 24, *s.* 9—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 42—*Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 60.

Under s. 60 of the Settled Land Act, 1882, the trustees appointed for the purposes of the Act may, in the event of the tenant for life being an infant, exercise the powers vested in him by the Act for his benefit during his minority:—

Held, that this provision did not constitute the trustees trustees with power of sale of the settled land under s. 42 of the Conveyancing and Law of Property Act, 1881, so as to entitle them to possession during the minority of the infant, and afforded no answer to an application by the testamentary guardian under 12 Car. 2, c. 24, for possession.

Colonel Helyar, of Poundisford Lodge, near Taunton, by his will, dated February 21, 1900, appointed the defendants to be trustees and executors thereof, and also trustees for the purposes of the Settled Land Acts, 1882 to 1890, and he appointed the plaintiff Mrs. Fane to be guardian of his children during their respective minorities. The testator authorized her to reside at Poundisford Lodge rent-free so long as she should be acting as guardian to his children, provided that she kept the house as a home for his children; and subject thereto he devised Poundisford Lodge and all other his real estate in the parish of Pitminster to his trustees to the use of his eldest son, the plaintiff Vincent Helyar, for his life with divers remainders over. And the testator declared that, if his trustees should enter into possession of the said hereditaments or any undivided share thereof during the infancy of a tenant for life or tenant in tail under his will, and such tenant for life or tenant in tail should die during such infancy, then and in such case the accumulations (if any) arising during such infancy should be held upon such trusts as the same would be held upon if the

JOYCE J. 1901 HELYAR, *In re.* HELYAR *v.* BECKETT.

same were capital money arising from the sale of the said hereditaments under the said Settled Land Acts.

The testator made a codicil to his will on February 27, 1900, not material to the present purpose, and he died a widower on July 26, 1900, leaving him surviving five children, all of whom were infants.

The plaintiff Mrs. Fane, who since the testator's death had acted as guardian to the children, and had been let into possession of Poundisford Lodge, claimed, under 12 Car. 2, c. 24, as guardian to the plaintiff Vincent Helyar and during his minority, to enter into the receipt of the rents and profits of all the real estate at Pitminster devised to him by the will, and to apply the same for his benefit.

The defendants, however, refused to give up possession to her, upon the ground that such a course would not be for the welfare of the infant or for the benefit of the property.

This summons was taken out by Vincent Helyar (by his next friend, Miss Ada Michel) and Mrs. Fane for a declaration that Mrs. Fane, as guardian of the said infant Vincent Helyar, was entitled during the minority and for the benefit of the infant to the possession of and to receive the rents and profits of the property in question, and for consequential relief.

Hughes, K.C., and *H. Warlters Horne*, for the plaintiffs. The plaintiff Mrs. Fane as testamentary guardian is entitled to receive the income of the property in question and apply it for the benefit of the infant: 12 Car. 2, c. 24, s. 9 (1); *Rex* v. *Inhabitants of Oakley* (2); *In re Cowley* (3); Simpson on Infants, 2nd ed. p. 448. The only duty of the executors is to hand over the property to the person entitled to possession and receipt of the rents—in this case the guardian.

(1) Sect. 8 of 12 Car. 2, c. 24, authorizes fathers to dispose by deed or will of the custody of their children during minority.

Sect. 9 enacts that "such person or persons to whom the custody of such childe or children hath beene or shall be soe disposed or devised shall and may take into his or their custody to the use of such childe or children the proffitts of all lands tenements and hereditaments of such childe or children . . . . till their respective age of 21 yeares or any lesser time according to such disposition aforesaid."

(2) (1809) 10 East, 491, 494.

(3) [1901] 1 Ch. 38.

The executors are not appointed by the will to be trustees for the purposes of s. 42 of the Conveyancing Act, 1881. (1) The common form so appointing them seems to have been advisedly omitted in order to avoid any conflict of powers between the testamentary guardian and the executors.

Younger, K.C., and *W. H. Cozens-Hardy*, for the respondents. Sect. 9 of 12 Car. 2, c. 24, is in effect overridden by s. 42 of the Conveyancing and Law of Property Act, 1881. (1)

It is said that there are no trustees for the purposes of s. 42 of the Conveyancing Act; but the defendants are so appointed by implication because the testator contemplated their entering into possession, and in no other way could they do so except under s. 42.

Moreover, the defendants are "trustees with power of sale of the settled land" within s. 42. They are expressly appointed trustees for the purposes of the Settled Land Acts, and under s. 60 of the Settled Land Act, 1882, where the tenant for life is an infant, the powers vested in him under that Act may be exercised by the trustees of the settlement, i.e., the trustees appointed for the purposes of the Act. The defendants are consequently trustees with a power of sale of the settled land during the minority of the tenant for life.

But assuming that these defendants cannot assert any title in themselves, the Court has power to appoint them trustees for the purposes of s. 42 of the Conveyancing Act, 1881, and we ask the Court to exercise that power on the ground that

(1) Sect 42, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, provides as follows:—

"If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply."

[The remaining sub-sections deal with the management of the land and the application of the income arising therefrom during the minority of the infant.]

JOYCE J. 1901 HELYAR, *In re.* HELYAR *v.* BECKETT.

it is more for the benefit of the infant that they should be so appointed than that the testamentary guardian should be let into possession. The powers of trustees under s. 42 of the Act of 1881 are well defined, while those of a testamentary guardian are very vague: see *Gardner* v. *Blane* (1), where it was held that the appointment of a testamentary guardian did not, under 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the infant's estate.

Hughes, K.C., in reply.

JOYCE J. In this case the testator made a will which contained a specific devise of the Pitminster estate to the infant plaintiff for life, and he appointed the defendants trustees for the purposes of the Settled Land Acts, but did not expressly appoint them trustees for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881. And the will contained the following clause: [His Lordship read the clause providing for the application of the accumulations of income in the event of the death of the infant tenant for life during his minority.]

Now, it cannot be denied that that is a very apt and proper clause to be inserted in this will if the testator had appointed the persons there referred to as trustees trustees for the purposes of s. 42 of the Conveyancing Act, 1881. It exactly fits the later clauses of that section. In particular, I observe that clause iii. of sub-s. 5, which deals with the residue of the income after providing for the maintenance of the infant, says that the trustees shall stand possessed of the accumulations, "if the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement." Now, that is exactly what this clause directs. Therefore I have no doubt either that the draftsman of this will thought he had appointed the defendants trustees for the purposes of s. 42 of the Conveyancing Act, 1881, or that this clause is a common form when the

(1) (1842) 1 Hare, 381.

trustees of the will are also appointed trustees for the purposes of that section. But the defendants are not expressly appointed trustees for those purposes, and I cannot hold that the mere indication of the mind of the draftsman was equivalent to such an appointment, so as to enable the defendants to exercise the powers of the section. In my opinion, the defendants are not appointed trustees for the purposes of s. 42.

Then it is said that, being appointed trustees for the purposes of the Settled Land Acts, they are, by virtue of s. 60 of the Act of 1882, trustees for the purposes of s. 42 of the Conveyancing Act. By s. 60 of the Settled Land Act, 1882, "where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement." What is the meaning of the expression "trustees of the settlement"? To arrive at that we must go to s. 2, which contains the definitions. By sub-s. 8 of that section "the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement." The defendants are by this will, i.e., by the settlement in this case, declared to be trustees for the purposes of the Settled Land Acts. Therefore they are trustees of the settlement under s. 60. Then, are they trustees with a power of sale of the settled land under s. 42 of the Conveyancing Act, 1881? After carefully considering this question, I have come to the conclusion that they are not. By the Settled Land Act, 1882, the power of sale is vested in the tenant for life, and none the less because he happens to be an infant; and all that these defendants have is a statutory authority to exercise on behalf of the tenant for life, if an infant, the power of sale vested in him. In other words, it appears to me that the mere fact that the defendants are trustees for the purposes of the Settled Land Act, and, therefore, trustees of the settlement under s. 60, does not make them trustees with a power of sale of the settled land within s. 42

JOYCE J.
1901
HELYAR, *In re.* HELYAR *v.* BECKETT.

of the Conveyancing Act, 1881; and, therefore, they are not trustees under that section. That being so, I am prepared to make a declaration that the defendants are not trustees for the purposes of or under s. 42 of the Conveyancing Act, 1881, and that Mrs. Fane, as testamentary guardian of the infant, is entitled during his minority to receive the rents and profits of the property in question by virtue of the Act of Charles II.

Solicitors: *Sismey & Cook, for H. B. Batten, Yeovil; Reed & Reed, for Reed & Co., Taunton.*

H. B. H.

SWINFEN EADY J.
1901
Dec. 6, 7.

In re SPIRAL GLOBE, LIMITED.

Company — Debentures — Registration — Extension of Time — Protection of Creditors — Winding-up — Companies Act, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

Debentures containing a floating charge on the assets and undertaking of a company were not registered as required by s. 14 of the Companies Act, 1900, the omission to register being due to inadvertence. After the commencement of the winding-up of the company, the debenture-holders applied, under s. 15 of the Act, for an order extending the time for registration:—

Held, that the order must state that it was "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

The principle of *Crew* v. *Cummings*, (1888) 21 Q. B. D. 420, and *Ex parte Furber*, [1893] 2 Q. B. 122 (as to extending the time for registration of a bill of sale), is not limited in its application to cases in which the ownership of or property in goods has actually changed; it extends to cases in which the rights of third parties have actually accrued and would be prejudicially affected if registration were allowed without saving those rights.

THE Spiral Globe, Limited, was incorporated in 1897, and on August 28, 1900, by a resolution of the board of directors it was determined to authorize the issue at par of a series of twenty debentures of 100*l.* each. At a meeting of the board on August 31, 1900, the form of debentures was submitted and approved, and it was resolved that the seal should be affixed to twenty debentures of 100*l.*, bearing interest at 6 per cent.

The debentures were sealed accordingly, and all ranked pari passu and were charged upon the whole of the assets and undertaking of the company by way of floating charge. On September 24, 1900, the company issued to William Watson & Co. ten of the debentures—numbered 1 to 10 inclusive—but the balance of the debentures was not then issued.

On January 1, 1901, the Companies Act, 1900, came into operation. On January 3, 1901, it was resolved that the remaining ten debentures—numbered 11 to 20 inclusive—should be deposited with the company's bankers, William Watson & Co., and this was done on January 5, 1901, the debentures being so deposited to secure an overdraft. In February, 1901, it was arranged that T. E. Vickers should advance to the company 500*l.* in part discharge of the company's overdraft and receive five of the last-mentioned ten debentures, and this was done.

In April, 1901, the company passed special resolutions for winding up voluntarily and the appointment of a liquidator.

On July 3, 1901, William Watson & Co., on behalf of themselves and all other holders of the debentures, commenced an action for the purpose of enforcing all the debentures ; and on July 30, 1901, judgment was pronounced directing the usual accounts and inquiries. In prosecuting the inquiries under the judgment, it transpired that the debentures issued on January 5, 1901, had not been registered pursuant to s. 14 of the Companies Act, 1900. The assets of the company were not sufficient, without recourse to those charged by the debentures issued in January, 1901, to satisfy the general creditors of the company.

William Watson & Co. and T. E. Vickers moved, under s. 15 of the Companies Act, 1900, for an order extending the time for registration of the ten debentures issued in January, 1901, on the ground that the omission to register them was due to inadvertence.

Mark Romer, for the applicants. Sect. 14, sub-s. 7, of the Act of 1900 provides that it shall be the duty of the company to register every mortgage or charge created by the company

SWINFEN EADY J.

1901

SPIRAL GLOBE, LIMITED, *In re.*

and requiring registration, and the applicants have not themselves been guilty of any breach of duty. If the money had all been required at once all the debentures would have been issued before the Act came into operation, and registration would have been unnecessary. What the applicants desire is an order simply extending the time for registration, and without any such conditions as those imposed by Buckley J. in *In re Joplin Brewery Co.* (1) The report of that case in the *Weekly Notes* does not shew the grounds of the decision, and it is understood that it was immaterial to the applicants in that case whether the conditions were or were not imposed. If the same conditions are imposed here the general creditors will obtain the benefit of the property charged by the debentures through the inadvertence of the company, and will deprive the debenture-holders of their security although they have not been guilty of any default. Sect. 14 of the Bills of Sale Act, 1878, gives power to a judge of the High Court to extend the time for registering a bill of sale, and conditions similar to those imposed in *In re Joplin Brewery Co.* (1) were sometimes imposed when an extension of time was given. But the language of s. 14 of the Bills of Sale Act is different from that of s. 15 of the Companies Act, 1900; and, moreover, *Crew* v. *Cummings* (2) and *Ex parte Furber* (3) shew that the reason for imposing conditions was that vested rights should not be interfered with, for the benefit of the bill of sale holder, by extending his time for registration. In the former case the rights of a creditor who had taken goods in execution had vested under s. 14 of the Bills of Sale Act, and in *Ex parte Furber* (3) the estate of the bill of sale holder had vested in his trustee in bankruptcy. But the winding-up of a company differs from the bankruptcy of an individual in this respect, for the property of the company remains in it as a corporation until the company is dissolved, and does not vest in the liquidator. The general creditors of the company have not higher rights than the liquidator has. If any conditions are imposed they should only extend to preserve the rights of those who

(1) W. N. (1901) 216; now reported [1902] 1 Ch. 79.

(2) 21 Q. B. D. 420.

(3) [1893] 2 Q. B. 122.

became creditors after the debentures were issued. Sect. 15 of the Act of 1900 gives power to extend the time if the judge is satisfied that the omission to register—not the issue of the debentures—is "not of a nature to prejudice the position of creditors."

Harold Simmons, for the liquidator of the company.

Cur. adv. vult.

Dec. 7. SWINFEN EADY J. (after stating the facts). I am satisfied that the omission to register was due to inadvertence, and am willing to make an order extending the time, but with the addition of the words, "This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." Counsel for the applicants said that an order in this form would probably be of little use to him, having regard to the winding-up and the appointment of a liquidator, and asked to have those words omitted; and contended further that the omission to register could only have prejudiced the position of creditors who had become such since the issue of the debentures, and that at all events the order should only preserve the rights of such creditors, and should not extend to persons who were creditors of the company when the debentures were issued or to the liquidator. In support of his argument he referred to *Crew* v. *Cummings* (1) and *Ex parte Furber* (2), cases decided under the Bills of Sale Act, 1878, and which did not appear to have been referred to in the recent case, before Buckley J., of *In re Joplin Brewery Co.* (3) These cases, he contended, shewed that the object of s. 14 of the Bills of Sale Act, 1878 (which is in pari materiâ with s. 15 of the Companies Act, 1900), was only to protect the rights of persons in whom any property of the mortgagor had actually vested before the registration of the debentures. I am unable to accept this view. It is true that on the winding-up of a company the property does not become vested in the liquidator as it does become vested in the trustee of a bankrupt on the

(1) 21 Q. B. D. 420. (2) [1893] 2 Q. B. 122.
(3) W. N. (1901) 216; [1902] 1 Ch. 79.

SWINFEN EADY J.
1901
SPIRAL GLOBE, LIMITED, *In re.*

bankruptcy of an individual. But the principle of the cases before referred to is not limited in its application to those cases in which the ownership of or property in goods or chattels has actually changed; it extends, in my judgment, to cases in which the rights of third persons have actually accrued, and which would be prejudicially affected if registration were allowed without saving and protecting those rights. Upon a winding-up the rights of the whole body of the company's creditors have intervened, and the position of the liquidator, and through him of all the general creditors of the company, would now be very much prejudiced if the time for registration were unconditionally extended. The company being now in liquidation, the difficulty cannot be avoided by issuing fresh debentures. The order will therefore be made, but with the addition of the words before mentioned.

Solicitor for applicants and liquidator: *J. J. Hands.*

F. E.

SWINFEN EADY J.
1901
Dec. 21.

LEIGH *v.* LEIGH.

[1900 L. 217.]

Statute—Construction—Advowson—Patron—Infant—Trustees to Present during Minority—Guardian.

An Act authorized the sale of glebe land with the consent of the patron, to be given in case of the infancy of the patron by his guardian.

An infant was tenant in tail male under a settlement which gave trustees the right of presentation during the minority of the tenant in tail:—

Held, that the trustees were not patrons within the meaning of the Act, and that the guardian of the infant was the proper person to give the consent of the patron to a sale of glebe land.

ESTATES known as the Leigh estates, in Lancashire, were settled by an indenture dated July 10, 1901, made by direction of the Court in this action, in pursuance of a covenant contained in a marriage settlement dated October, 1886.

The settlement conveyed to trustees (inter alia) "the advowson and perpetual right of patronage and presentation of and

to the rectory or parish church of Walton-on-the-Hill, in the county of Lancaster, to hold the same unto the said trustees and their heirs to the use of the plaintiff, John Cecil Gerard Leigh (now an infant), in tail male with remainders over" ;· and the settlement contained the following provision, namely: "Provided also that during the minority of any person who, under the limitations hereinbefore contained, is or would, if of full age, be entitled for the time being to the possession or the receipt of the rents and profits of the freehold hereditaments hereby settled as tenant in tail male or in tail by purchase, the trustees or trustee may present a fit person to any vacant ecclesiastical benefice either absolutely or subject to such lawful terms as to resignation as the trustees or trustee deem proper."

By a private Act (6 & 7 Vict. c. 16), passed in 1843, for the purpose of dividing the parish of Walton-on-the-Hill, glebe lands were vested in trustees with power to sell with the consent of (inter alios) the patron or patrons.

Sect. 51 of the Act provided "that all acts, matters, and things by this Act authorized to be done and every consent required to be signified by the patron of any of the aforesaid rectories, or of the said present rectory and of the said vicarage of Walton-on-the-Hill, may be done and signified by the patron or patrons for the time being of the said respective benefices, whether one or more, who shall be seised of the advowson thereof in possession, whether for an estate of inheritance or any less estate, and by any such patron or patrons, being a married woman or married women, notwithstanding her or their coverture, and by the guardians or committees of any such patron or patrons, being an infant or infants, lunatic or lunatics, or idiot or idiots respectively; and that every act, matter, and thing which shall be so done, and every consent which shall be so signified, shall be as valid and effectual as if the party or parties by whom or on whose account such act, matter, or thing shall be done and such consent signified was or were seised of the said advowson in fee simple in possession, and free from any incapacity."

This was a summons taken out on behalf of the plaintiff to

SWINFEN EADY J.
1901
LEIGH v. LEIGH.

have it determined whether the consent of the patron to a sale of glebe land of the rectory of Walton-on-the-Hill must be given by the trustees of the settlement, or in the infant's name by his mother, who was testamentary guardian. In order to carry out an advantageous sale of building land it was desired to get the decision at once, and for that purpose the hearing of the summons had been expedited.

Method, for the trustees of the Leigh settlement. The patron of a living for the time being is the person who has the present right to present in case of a vacancy: Co. Litt. 119 b. During the minority of the tenant in tail male the trustees are the proper persons to give the consent required from the patron.

Arkle, for the trustees of the Act, and *R. J. Parker*, for the infant. An advowson is not a mere power, but is an incorporeal hereditament. The patron or advocatus is the owner of the advowson: he has other rights and duties to exercise besides the mere right or power to present; the tenant in tail of the advowson is the patron of Walton-on-the-Hill, and his consent has to be given by his guardian: Lyndwood, Prov. 97, Gloss (p); *Hoskins* v. *Featherstone* (1); *Strachy* v. *Francis* (2); *Duke of Portland* v. *Bingham* (3); Du Cange's Glossary, "Patronus"; Constitutions of Clarendon, Stubbs's Select Charters, 138, 8th ed.; Bracton, book 4, tract. 2, De assisâ ultimæ præsentationis, 240 b.

Method, in reply.

SWINFEN EADY J. This summons has been adjourned to me out of its turn in order that it may be disposed of before the Court rises for the Christmas vacation. I have, therefore, no opportunity of further considering the authorities, and I must deal with the matter at once as it now stands.

In my opinion, the proper person to give the consent in this case is the guardian, according to the terms of the Walton-on-the-Hill Rectory Act, 1843, under which the glebe land

(1) (1789) 2 Bro. C. C. 552. (2) (1741) 2 Atk. 217.
(3) (1792) 1 Hagg. Cons. 157, 167.

may be sold. [His Lordship read s. 51 of the Act, and proceeded :—]

SWINFEN EADY J.

1901

LEIGH v. LEIGH.

I am of opinion that the trustees of the settlement are not entitled to the advowson for any estate of inheritance or for any less estate, but that the infant is tenant in tail in possession of the advowson. The advowson does not consist solely of the right of presentation, but confers other rights, such as the right to an injunction to restrain waste. The result is that, in my opinion, the consent should be given by the guardian, and not by the trustees.

Solicitors: *Rowcliffes, Rawle & Co.; Field, Roscoe & Co.; Lowe & Co.*

D. P.

In re PITT RIVERS. SCOTT *v.* PITT RIVERS.

C. A.

1902

Jan. 29.

[1900 P. 2431.]

Will—Absolute Gift—Secret Trust—Charity—Trust for Benefit of Public, but so that they should acquire no Rights.

The testator established a museum, and laid out a portion of his estate as a pleasure ground, and maintained the same for the benefit of the public, whom he admitted thereto under certain restrictions, while reserving to himself his private rights. By his will he devised and bequeathed the museum and pleasure grounds and an annuity of 300*l.* for the maintenance of the same to his son. It was alleged that these gifts were really subject to a secret trust in favour of the public :—

Held, on the evidence, that it was proved that the testator intended his son to maintain the museum and grounds and allow the public access thereto as before, and that the son accepted the gifts with the assurance that this should be done; but that the testator intended that the public should acquire no rights, and therefore that no charitable trust had been created.

Decision of Kekewich J., [1901] 1 Ch. 352, reversed.

APPEAL from a decision of Kekewich J. (1)

The question in this case was whether a devise by General Pitt Rivers of a museum and pleasure grounds at Farnham, in Dorsetshire, was subject to a secret trust for the benefit of the public.

(1) [1901] 1 Ch. 352.

C. A. 1902 PITT RIVERS, *In re.* SCOTT *v.* PITT RIVERS.

The testator, who lived at Rushmore, on the borders of Wiltshire and Dorsetshire, purchased a house adjoining his Rushmore estate, and converted it into a museum for exhibiting articles and specimens which he had collected. The museum was open to the public all through the year, Sundays included, and was placed by the testator in charge of a caretaker. A further part of the Rushmore estate, known as the Larmer grounds, was laid out by the testator as a pleasure ground, to which the public were admitted under certain restrictions. In these grounds the testator had built a theatre where concerts and dramatic recitals were given at the testator's expense, and he also provided a band which played every Sunday afternoon in the summer months. The testator made no charge for admission, but he insisted that the privileges which he allowed to the public should not be enjoyed as of right, and he put up notices in the Larmer grounds stating that the grounds were private property, and that persons found trespassing therein would be prosecuted, and that the gates to the grounds would be kept locked once in every year from sunrise to sunset.

By his will General Pitt Rivers devised his real estate, including Rushmore, the museum, and Larmer grounds, to trustees upon trust, subject to certain rent-charges, for his first and other sons successively for life and then in tail male. By a codicil dated November 20, 1899, he bequeathed to his eldest son, the appellant, A. E. L. F. Pitt (afterwards Pitt Rivers), and his heirs male the museum and its contents, the objects of curiosity in his house at Rushmore which were intended to be placed in the museum, his Larmer grounds, and 300*l.* a year for the maintenance of the museum and Larmer grounds. He directed that the museum, grounds, and objects of interest therein should be kept in a good state of preservation, and he appointed two persons trustees "only for the purposes so far as necessary in connection with the future maintenance of the said museum, Larmer grounds, and the objects of interest therein and thereon."

A question arose whether the effect of correspondence and conversations which had taken place between the testator and his eldest son, A. E. L. F. Pitt, and his solicitors had been to

impress upon the property given by the codicil a secret trust in favour of the public.

It appeared that, some years before the execution of the codicil, the testator had written to his son a letter in which he said: "I am glad to see by your letter received to-day that you take a reasonable view of my wishes in regard to the museum and other establishments here. I shall be glad to feel that it is not necessary for me to make special provisions for the keeping up of these things, which would deprive the owner of Rushmore of the pleasure and credit of keeping them up of his own free will, and make the people of the neighbourhood gradually come to look upon them as a right. Whereas my great object is that the estate, viewed as an institution for the benefit of its surroundings, should continue to be regarded as voluntarily contributing to the pleasure and benefit of the people about." It was proved that the testator did not depart from this view; and he declined to adopt a suggestion made by his solicitors that he should leave the property to trustees as a charitable trust. He had frequent conversations with the son, and finally shewed him the codicil; and the evidence of that interview proved that it might be inferred that the son thereupon agreed to continue things as they were in his father's lifetime.

Kekewich J. held that the codicil did not create a trust, but that the evidence established a secret trust to maintain the museum and pleasure grounds and allow the public access thereto, but so that the public should acquire no rights; that the intention not to give the public any rights must yield to the intention that the property should be maintained as theretofore; and that this was a trust enforceable for the benefit of the public.

The son appealed.

Haldane, K.C., *P. O. Lawrence, K.C.*, and *W. M. Cann*, for the appellant. The Court will look into the nature of the whole transaction: *Hughes* v. *Stubbs*. (1) General Pitt Rivers, if he meant to bind his son at all, only desired to do so as

(1) (1842) 1 Hare, 476.

C. A. 1902

PITT RIVERS, *In re.* SCOTT *v.* PITT RIVERS.

between his son and himself; he had no desire to create any rights in any other person. An intention to give no rights to the public is not inconsistent with a wish to impose an obligation on the son. The questions here are, What was the intention of the testator? Was it communicated to the son, and did he accept the obligation? The burden of proof is really on the Attorney-General to shew that a trust has been created; but we submit that it is clear that the testator intended to give the public no rights, and therefore that this cannot be a charitable trust. He only intended that his son should act as he himself had done. To establish a trust it must be shewn that there was a bargain between father and son, any departure from which on the part of the son would be a fraud: *McCormick* v. *Grogan*. (1) It is only on that ground that the Court avoids the provision of the Wills Act prohibiting verbal dispositions of land. No such bargain can be proved here. It is not enough that the testator hoped that the public would be admitted as before. He himself never allowed them to acquire any rights.

Sir R. B. Finlay, *A.-G.*, and *R. J. Parker*, for the Crown. The law as to secret trusts is concisely stated in *Jones* v. *Badley*. (2) We have to prove that the testator intended to create a trust, that that intention was communicated to the son, and that he accepted it. The codicil did not create a trust, but it shews that a trust was intended. The appointment of trustees is evidence of that. No doubt the son is to have very stringent powers of management—in fact, that is the solution of all the difficulties of this case. The testator would have revoked the codicil if he had known that the son would dispute the trust.

Renshaw, *K.C.*, and *F. L. Wright*, for the trustees appointed by the codicil.

Sheldon, for the executor.

VAUGHAN WILLIAMS L.J. The question in this case is whether, by reason of what happened between the testator and his son, Mr. Pitt Rivers, a trust has been created which is

(1) (1869) L. R. 4 H. L. 82, 97. (2) (1868) L. R. 3 Ch. 362.

binding on the conscience of Mr. Pitt Rivers, and therefore enforceable in equity against him. There is no suggestion that a trust has been created by the codicil of November 20, 1899, which is the codicil that we have to consider in this case. The suggestion is that there has been such a distinct promise made by Mr. Pitt Rivers to the testator, his father, in consideration of which his father may be taken either to have executed the codicil, or to have refrained subsequently from revoking it, that that promise will be enforced against Mr. Pitt Rivers. In order to constitute such a promise binding upon the person who has taken a benefit under the will, it is absolutely necessary that the trust should be communicated to the donee, and that he should accept it. We have therefore to see whether such a promise is proved. It has been discussed very often what are the essentials which are necessary in order to induce the Courts to give effect to a trust which has not been expressed in the way in which the Wills Act requires that testamentary intentions should be expressed, but I am happy to say that in this case one has not to go into any fine questions about that. One is really relieved by the evidence from the necessity of so doing. I suppose one may state shortly and concisely that the Court never gives the go-by, if I may use the expression, to the provisions of the Wills Act by enforcing upon any one testamentary intentions which have not been expressed in the shape and form required by that Act, except for the prevention of fraud. That is the only ground upon which it can be done. But I am not going here to enter into any sort of question as to how distinct the promise need be in order to induce the Court to enforce that promise, and the trust arising under it. I will really, because the evidence enables me to dispose of this case if I do so, deal with this promise as if it were a mere question between A. and B., whether the bargain was entered into, and I do not look for any greater distinctness than one generally has to employ when one is asking one's self, apart from questions of the Wills Act, Aye or no, is the promise established here? In my judgment no such promise has been established as can be enforced as a trust on the conscience of Mr. Pitt Rivers, the son.

C. A. 1902 PITT RIVERS, *In re.* SCOTT *v.* PITT RIVERS. Vaughan Williams L.J.

[His Lordship referred to the evidence, and held that, if any promise by the son could be inferred, there had been no promise by him further than that he would continue to use the property for the amusement and enjoyment of the public in the same way that his father had done. There was no such promise as would create a trust. The testator was extremely anxious that the museum and grounds should remain the property of the owner of Rushmore, and that anything that was done should be done by the owner of Rushmore voluntarily and of his own free will; and that desire was entirely inconsistent with the creation of a charitable trust. His Lordship continued:—]

We are asked to say that, in consequence of the son having promised his father that he would continue things as they were in his father's lifetime, a trust has been created which the Court ought to enforce—that is to say, a trust has been created by the giving by the son of a promise which it would be unconscientious for the son not to perform. I cannot agree. I find no such promise at all. The only promise I do find is a promise which to my mind is much more consistent with the absence of a trust like that which is suggested here than it is with the presence of it.

I think, therefore, that the decision was wrong, and that it ought to be reversed.

STIRLING L.J. I am of the same opinion.

Kekewich J. in the first place decided that the codicil as it stands created no trust, but simply contained absolute gifts in favour of the testator's son; but he held that it appeared from the evidence that the testator communicated the existence of this codicil to the son, and at the same time disclosed to him his wishes with reference to the property, and exacted from the son an assurance that those wishes should be fulfilled. In the circumstances he came to the conclusion that a trust had been created which could be enforced as against the son at the instance of the Attorney-General as representing the public.

Now, what were the wishes which were thus communicated

to the son? In the first place the learned judge says this (1): "He"—that is the testator—"certainly did intend him"—that is the son—"to maintain the museum and grounds and to allow the public access thereto, and the son certainly accepted the gift of both with the assurance that this should be done." Then he adds this: "While giving the property already mentioned to the son for the purpose of maintaining the museum and grounds as heretofore, the testator insisted that the public should have no rights." I think that the conclusions of fact at which the learned judge thus arrived are justified by the evidence. The learned judge then proceeded to consider what was the legal effect of the communication so made with the result which I have stated: that he came to the conclusion that a trust had been created which could be enforced.

With the utmost respect, I am unable to agree with that conclusion on that state of facts. It seems to me that when once you arrive at the conclusion that the public were to have no rights, it is impossible to say that an effectual trust has been created; and, looking at the whole evidence, which I shall not go into, I think that what the testator meant really to do was that which, in the Irish case of *McCormick* v. *Grogan* (2), the Lord Justice of Appeal stated to have been the object of the testator whose bequests were the subject of consideration in that case. He considered there that the purpose was to set up, after the decease of the testator, not a trustee, "but, as it were, a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect." The truth is that the testator, though he had with the utmost liberality afforded admission to the public to the museum and grounds, yet had anxiously guarded throughout his whole life against the public acquiring any rights against him. It appears from the evidence that he was equally anxious that no such rights should be acquired by the public against his successors; and I think the result is that he was satisfied by his son and successor undertaking an honourable

(1) [1901] 1 Ch. 358. (2) L. R. 4 H. L. 82, 95.

C. A. 1902 PITT RIVERS, *In re.* SCOTT *v.* PITT RIVERS.

obligation to treat the museum and the grounds, which had been thrown open to the public during the testator's lifetime, as available to the public in the same manner and to the same extent as, and no further than, the testator himself had done. I agree, therefore, that the appeal ought to be allowed.

COZENS-HARDY L.J. I agree, and I have very little to add. It seems to me that the testator's wish, as expressed by him to his son, was inconsistent with the true idea of a charity. The public were to have no rights. It may be that he desired to create that which, not being in the view of the law a charity, would be void as a perpetuity. But I cannot see that the son is in any way bound to do more than to agree to hold the property upon the terms verbally expressed to him by the testator, and these terms do not create a charitable trust.

[Their Lordships made a declaration that on the true construction of the will and codicil the appellant was entitled for an estate in tail male to the property, and absolutely entitled to the annuity, free from any charitable trust; and directed that the inquiry as to the objects of curiosity in the testator's house, and the declaration that the trustees appointed by the codicil took no interest or estate, should be retained in the order.]

Solicitors: *Kennedy, Hughes & Ponsonby; Solicitor to the Treasury; C. R. Woolley; Tathams & Pym.*

H. C. R.

Applied. LONDON INVESTMENT, ETC. LTD. *v.* CENTRAL LONDON ELECTRICITY, LTD. [1948] 1 All E.R. 386.

HUSEY *v.* LONDON ELECTRIC SUPPLY CORPORATION.

C.A. 1902 Feb. 5, 6.

[1902 H. 230.]

Electric Lighting Company—Default in Payment by Consumer—Power to cut off Current—Change of Occupancy—Existing Supply of Current—Receiver appointed by Court—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 21—*Electric Lighting Orders Confirmation* (*No.* 2) *Act*, 1889 (52 & 53 *Vict. c. clxxviii.*), *Schedule* (*London Electric Supply*), *s.* 47.

Under s. 19 of the Electric Lighting Act, 1882, no person within the area supplied with electric current by an electric lighting company is entitled to a supply of current by the company unless and until he has entered into a contract with the company for the purpose.

Therefore, upon a change in the occupation of premises to which current is being supplied by an electric company, there being a debt due to the company from the outgoing occupier in respect of current already supplied to him, the company are entitled to discontinue the supply until the new occupier has entered into a contract with them for a supply to him.

At the instance of debenture-holders of an hotel company, the Court appointed a receiver of the undertaking and property of the company. The order directed the company to deliver to the receiver possession of the hotel "so far as is necessary for the purpose of such receivership," and the receiver at once took possession of the hotel. At this time electric current for lighting the hotel was being supplied by an electric lighting company, and a large sum was due to them from the hotel company for current already supplied:—

Held, that the electric company were entitled to discontinue the supply of current until the receiver had entered into a new contract with them for its supply.

Decision of Kekewich J. reversed.

APPEAL against an interlocutory injunction granted by Kekewich J., restraining the defendants from cutting off the supply of electric current to the St. Ermin's Hotel, Victoria Street, Westminster, of which the plaintiff was in possession as receiver appointed by an order of Kekewich J. in a debenture-holders' action.

The business of the hotel was carried on by a company called The Mansions Proprietary, Limited. Electric current was supplied to the hotel by the defendant corporation under an agreement dated April 1, 1897, between them and the

C. A. 1902 HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION.

company. This agreement contained a clause (7) which provided that the defendants "shall be at liberty to discontinue the supply of energy if and so long as the consumer shall make default in making payment in accordance with the agreement hereinbefore contained," that is, by quarterly payments, or, if required by the defendants, at shorter periods, at the rate specified in the defendants' published scale of charges.

On January 17, 1902, in an action by debenture-holders against the hotel company, the plaintiff Husey was, by an order of Swinfen Eady J., appointed receiver of the undertaking, property, and assets of the company. The order directed the company to deliver over to the plaintiff as such receiver all books, leases, deeds, papers, and documents relating to the property comprised in the debenture trust deeds, and all the stock-in-trade and effects in the possession of the company of the business carried on by them, and the licences relating thereto, "and also possession of the said premises so far as is necessary for the purpose of such receivership." At this time there was due from the company to the defendant corporation a sum of 437*l.* 2*s.* for electric current supplied by them to the hotel. Possession of the hotel and of the other property of the company was delivered by the company to the receiver on the day on which he was appointed. The corporation then requested him to sign an undertaking that the 437*l.* 2*s.* should be paid within twenty-eight days, and that accounts for the supply of electric energy subsequent to January 18 should be paid weekly during his tenure of the receivership. At this time the receiver had not made any written application for the supply of electric current. He declined to sign the proposed undertaking, and thereupon the corporation threatened to cut off the supply of current at once. The receiver did on January 20 sign an undertaking to pay the corporation for all light supplied since the date of his taking possession on January 17, and for all light which might be consumed during the continuance of the receivership.

On January 21 the receiver issued the writ in the present action, by the indorsement on which he claimed an injunction "to restrain the defendants from taking any proceedings by

cutting off or discontinuing the supply of electric current from their mains" to the hotel "to recover the amount due to them by the Mansions Proprietary, Limited, in respect of electric current supplied by them to the company prior to January 17, 1902."

On the hearing of a motion for an interlocutory injunction, Kekewich J. made the following order: "The plaintiff undertaking to make such necessary application and enter into a new contract as required by s. 47 of the provisional order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act, 1889, and the plaintiff undertaking to abide by any order this Court may hereafter think fit to make as to damages, in case the Court shall be of opinion that the defendants shall have sustained any by reason of this order which the plaintiff ought to pay, this Court doth order that the defendants be restrained until such undertaking to make such application as aforesaid be complied with from cutting off or discontinuing the supply of electric current from their mains to the premises known as St. Ermin's Hotel." And at the request of the defendants it was further ordered that pending an appeal the plaintiff was not to make the application referred to.

Kekewich J. was of opinion that the plaintiff was an "occupier" of the hotel within the meaning of the provisional order, and that as such the defendants were bound to supply him with electric current upon the conditions mentioned in the provisional order, but that he was entitled to a reasonable time within which to make an application for supply, and that meanwhile the defendants were not entitled to discontinue the existing supply.

The defendants appealed, and asked that the order for an injunction might be discharged.

The plaintiff served a cross-notice that on the hearing of the appeal he should contend that he ought not to have been required as a condition of the granting of the injunction to give the undertaking to make the application required by s. 47 of the provisional order, but that the injunction ought to have been granted unconditionally until the trial of the action or further order.

C. A. 1902 HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the defendants. The plaintiff's case is that he is not bound by the agreement of April 1, 1897, between the hotel company and the defendants, but must be treated as a new "occupier" of the hotel. But a receiver appointed by the Court is a mere caretaker. He is appointed for the purpose of keeping things in medio: *Paterson* v. *Gas Light and Coke Co.* (1) The order appointing the plaintiff receiver, though it directs the company to deliver possession of the hotel to him "so far as is necessary for the purpose of such receivership," does not place him in any different position from that of the receivers in *Paterson's Case*. (1) The defendants have a legal right to cut off the supply of current under s. 21 of the Electric Lighting Act, 1882 (2), as well as under s. 47 of the schedule (London

(1) [1896] 2 Ch. 476.

(2) By s. 19, "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorizing such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply."

By s. 20, "The undertakers shall not, in making any agreements for a supply of electricity, shew any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorizing them to supply electricity."

By s. 21, "If any local authority, company, or person neglect to pay any charge for electricity or any other sum due from them to the undertakers in respect of the supply of electricity to such local authority, company, or person, the undertakers may cut off such supply, and for that purpose may cut or disconnect any electric line or other work through which electricity may be supplied, and may, until such charge or other sum, together with any expenses incurred by the undertakers in cutting off such supply of electricity as aforesaid, are fully paid, but no longer, discontinue the supply of electricity to such local authority, company, or person."

By the Electric Lighting Orders Confirmation (No. 2) Act, 1889, a provisional order (London Electric Supply) granted by the Board of Trade to the defendants in that year was confirmed. Sect. 47 of that order provided (inter alia) that the undertakers (that is, the defendants) should, "upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers . . . . give and continue to give a supply of energy for such premises in accordance with the provisions of this order . . . . subject to the conditions following" (inter alia): "Every owner or occupier of

Electric Supply) to the Electric Lighting Orders Confirmation (No. 2) Act, 1889, and there is no equity to interfere with that legal right.

[*Warrington, K.C.*, for the plaintiff. The plaintiff's case is that the defendants have no right to cut off the supply as against him. They cannot compel him to pay the hotel company's debt, or obtain priority for it over the debenture-holders.]

If the plaintiff is bound by the contract between the defendants and the hotel company, the defendants are clearly entitled by reason of the company's default in payment to cut off the supply. If the plaintiff is a new occupier of the hotel, then, neither under s. 19 of the Act of 1882, nor under s. 47 of the provisional order, is he entitled to demand a supply of current until he has given notice to the defendants, and has entered into a contract with them for a supply. This he has not yet done, and therefore the defendants have a right to discontinue the supply of current. The plaintiff really wishes to have the benefit of the old contract with the hotel company without accepting the burden of it. Sect. 19 of the Act of 1882 limits the right of the electric company to enter into contracts with consumers. It prevents their making preferential contracts, but it does not relieve the consumer from

---

premises requiring a supply of energy shall serve a notice upon the undertakers specifying the premises in respect of which such supply is required," the *maximum* power required and the day "(not being an earlier day than a reasonable time after the date of the service of such notice)" on which the supply is required to commence; and "enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least two years of such an amount that the payment to be made for the same, at the rate of charge for the time being charged by the undertakers for a supply of energy to ordinary consumers within the area of supply, shall not be less than 20*l.* per cent. per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of such supply, and give to the undertakers (if required by them so to do) security" for payment. If, after notice by the undertakers, security is not given by the owner or occupier within seven days, or if the security given becomes invalid or insufficient, "the undertakers may, if they think fit, discontinue to supply energy for such premises so long as such failure continues."

C. A. 1902 HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION.

the necessity of entering into a contract before he can demand a supply. It implies that he must do so: *Metropolitan Electric Supply Co.* v. *Ginder*. (1) Sect. 47 of the provisional order is of general application; the condition requiring a contract is not limited to applications for a first supply to premises.

Warrington, *K.C.*, and *C. T. Mitchell*, for the plaintiff. It is submitted that the learned judge was right in restraining the defendants from cutting off the supply, but that he was wrong in imposing on the plaintiff the undertaking to make application for a supply of current. The injunction should have been granted in the ordinary form "until the trial of the action or further order." As the order stands, the defendants could cut off the supply as soon as the plaintiff makes an application.

It is submitted that the plaintiff is entitled to have the company restrained from cutting off the current. Under s. 19 he is entitled to a supply on the same terms on which any other person is entitled to a supply. That section says nothing about "owner" or "occupier"; any person within the area is entitled to a supply.

[VAUGHAN WILLIAMS L.J. How are the terms of the supply to be arrived at?]

By means of the terms which are charged to other persons within the area. The right to cut off the supply is purely statutory: it is conferred by s. 21 of the Act of 1882. That section differs from s. 16 of the Gas Works Clauses Act, 1847, which was in question in *Paterson's Case*. (2) Sect. 16 gave power to cut off the supply of gas from premises; s. 21 of the Act of 1882 only gives power to cut off the supply from the person who is in default. The defendants have no power to discontinue the supply because a previous occupier is in default, or to make the payment of arrears due by a previous occupier a condition precedent to a supply to a new occupier.

Many of the provisions of s. 47 of the provisional order do not apply to a case in which a supply of current is already existing, e.g., the provision that the day for the commencement of a supply must not be earlier than a reasonable time after

(1) [1901] 2 Ch. 799. (2) [1896] 2 Ch. 476.

service of the notice. No time is necessary then. And it is submitted that when there is an existing connection with the main it is not necessary that the new occupier should enter into a contract with the undertakers as a condition precedent to the continuance of the supply of current. This view is confirmed by the provisions of s. 47 as to what is to be contained in the contract. The section makes a distinction between giving a supply of current and continuing an existing supply. The defendants are bound to continue the supply to premises which they are already supplying.

There is no authority which shews that the plaintiff is not an occupier of the hotel. In *Paterson* v. *Gas Light and Coke Co.* (1) the receiver had been in possession at first only as agent of the company which had issued the debentures, and, in order to come within the provisions of s. 18 of the Gas Light and Coke Company's Act, 1872, he had to shew that he was the "next tenant" of the premises. He failed to do that, because his possession continued. Rigby L.J. said (2) there had been "no change of ownership." In *In re Smith* (3) there was no change of ownership when the official receiver in bankruptcy took possession of the debtor's premises, and therefore s. 16 of the Gasworks Clauses Act, 1847, applied. In *In re Flack* (4) it was held that the trustee in a bankruptcy was in the position of an "incoming tenant" within the meaning of s. 48 of the Metropolis Water Act, 1871, and that the water company were not entitled to require him to pay arrears due to them by the bankrupt as a condition precedent to their continuing the supply of water. That case applies here. The decision in *In re Marriage, Neave & Co.* (5) was based upon there having been no change of occupier within the meaning of s. 16 of the Poor Rate Assessment and Collection Act, 1869, when a receiver and manager of a company's property and business was appointed by the Court. But in that case the order did not direct the company to give up possession of their premises to the receiver. That could not apply to the receiver of the

(1) [1896] 2 Ch. 476.
(2) Ibid. 485.
(3) [1893] 1 Q. B. 323.
(4) [1900] 2 Q. B. 32.
(5) [1896] 2 Ch. 663.

C. A. 1902 HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION.

business of an hotel, for the spirit and other licences must be transferred to him. There was, therefore, in the present case a change of occupation. At any rate, the defendants expressed their willingness to supply the plaintiff with current if he would secure the payment of the arrears, and this relieved him from the obligation of making a formal application to the defendants, because he knew that they would not supply him unless he paid or secured the arrears. This he was not bound to do. He asked for a continuance of the supply, but he did not adopt the old contract with the hotel company. In *Richards* v. *Kidderminster Overseers* (1) it was held by North J. that, on the entering into possession of a receiver appointed under a power contained in a debenture trust deed which provided that the receiver should be deemed to be the agent of the mortgagor company, there was a change of occupancy within the meaning of s. 16 of the Poor Rate Assessment and Collection Act, 1869.

Austen-Cartmell, in reply. The defendants did not tender the undertaking to the plaintiff as a new contract, but as a condition on which they would not exercise their immediate right to cut off the supply of current. It is the practice of the defendants whenever there is a change of tenancy to stop the supply of current until the new tenant comes into occupation. *In re Flack* (2) has no application to the present case. A supply of current can only be given to premises; there is no personal right in an owner or occupier independently of ownership or occupation of premises. *Paterson* v. *Gas Light and Coke Co.* (3) governs the present case. It is submitted that the plaintiff is not a new occupier of the hotel; but, whether he is so or not, the injunction ought not to have been granted.

VAUGHAN WILLIAMS L.J., after stating the facts and the order for an injunction, continued:—The question is whether Kekewich J. was right in granting this injunction.

It is obvious from the indorsement on the writ that the plaintiff's claim was then made upon the basis that the contract

(1) [1896] 2 Ch. 212. (2) [1900] 2 Q. B. 32.
(3) [1896] 2 Ch. 476.

between the defendant corporation and the hotel company was still a subsisting contract. But when the case came before Kekewich J. the plaintiff took up an alternative position, namely, that the occupation by the hotel company had come to an end, and that there was a new occupation of the hotel by himself. I will assume (at all events at first) that the latter contention of the plaintiff was right, for I think that contention puts him in the best position. I assume that the occupation by the hotel company had come to an end, and that the plaintiff was a new occupier. If that is so, then, in my judgment, the plaintiff was not entitled to any supply of electric current unless and until he had made a new contract with the defendant corporation. Of course, on the other hand, if we suppose that the old contract with the hotel company remained in force, and that the supply of current was to continue under that old contract, there can be no doubt that the defendant corporation were entitled to cut off the current because of the default of the hotel company in payment for the past supply under their contract with the defendant corporation.

Under these circumstances it seems to me that, in whichever way you regard it, this injunction restraining the defendant corporation from cutting off the current ought not to have been granted. Whether you assume that the old contract continued, or whether you assume that there was a change of occupation, in neither view of the case ought the defendants to have been restrained.

We have listened to a long argument on the question whether s. 47 of the confirmed provisional order of 1889 applies to any but a first contract for the supply of electric energy. It was argued that some of the clauses of that section, especially those which set forth the first and second conditions which are to be contained in a contract, cannot apply to any case but one in which there is for the first time a supply of electric energy to certain premises, and that those clauses have no application to a case in which there is an existing supply of electric energy by means of connections made under a previous contract. I do not propose to decide that question now. I think many cogent reasons might be urged to shew that s. 47

C. A. 1902 HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION. Vaughan Williams L.J.

is one of general application. I cannot, however, shut my eyes to some arguments to the contrary which were most forcibly urged by Mr. Warrington. But I do not think it is necessary to decide that question now.

According to my view, whichever may be the right construction of s. 47, it is plain that under the Act of 1882 no one is entitled to demand a supply of electric energy unless and until he has entered into a contract with the undertakers who are empowered to give the supply. In my opinion, the basis of the Act of 1882 is that persons who require a supply of energy shall be entitled to contract with the undertakers for it, provided that the undertakers shall not charge a price exceeding the limits imposed by the provisional order or special Act which authorizes them to supply electric energy, and provided also that the undertakers shall shew no preference. That is provided for in s. 19, the effect of which is that every person within the area shall be entitled to a supply of electric energy on the same terms as those on which any other person under similar circumstances is entitled to a corresponding supply. But that provision assumes that there is already a contract fixing the terms of supply as between the undertakers and some other person who is supplied by them. Then the Act says in effect that any other person within the area who wishes for a supply under similar circumstances is to have a right to insist upon having a similar contract. But that assumes that there will be a contract. And s. 20 is also framed, I think, upon the basis that there is to be a contract between the undertakers and the consumer. The outcome, in my judgment, is this —that the plaintiff is not entitled to any supply of electric current unless and until he has entered into a contract with the defendants for that supply. He has not yet entered into such a contract, and, so long as he has not done so, he is not entitled to have the defendants restrained from cutting off the current. If, as I have already said, the plaintiff is not the "occupier" of the hotel, if there has been no change of occupation, and the hotel company are still in occupation, à fortiori the defendants ought not to be restrained.

I will add a word upon a point which has been urged upon

us in regard to the purpose which it is said the defendants have in insisting upon cutting off the current unless and until a new contract is made by the plaintiff. It is said that the real object of the defendants is not to obtain a contract with the plaintiff, but to compel him as receiver for the debenture-holders to pay the debt of 437*l.* for electric current supplied to the hotel, which the debenture-holders are not really liable to pay. I do not know whether that is the whole object of the defendants; I will assume that it is part of their object. But if the defendants have a legal right to say, "We will cut off the supply of electric energy until a new contract is made by the plaintiff," and the truth is that the debenture-holders would rather pay the old account than have the hotel kept in darkness for a few days, so much the better for the defendants. They are perfectly entitled to exercise any legal rights which they have, and not the less so because by enforcing those rights they will probably obtain a collateral advantage. It seems to me that the question what the ultimate purpose of the defendants may be has nothing to do with the abstract point of law which we have to decide.

STIRLING L.J. I am of the same opinion, and will add only a few words.

The action is based upon the alleged infringement of a legal right. The injunction is not sought on any equitable ground other than this, that the plaintiff says that the defendants threaten and intend to violate his legal right to a continuous supply of electric current to the hotel. In order, therefore, to obtain an injunction, the plaintiff must shew that he has a legal right to that supply.

The plaintiff is the receiver appointed in an action by debenture-holders against the hotel company, and the order appointing him directed the company to deliver up possession of the hotel to him, and he has taken possession accordingly. The contract between the company and the defendants for the supply of electric current to the hotel was not put an end to by the appointment of the receiver. The debenture-holders have a charge upon all the property of the company,

C. A. 1902 HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION. Stirling L.J.

of which this contract formed part, and I apprehend that the plaintiff, by taking proper steps in the name of the company, might enforce the provisions of that contract and obtain a supply of current through the company. But there is a very good reason why he should not adopt that course, because the agreement expressly provided that the defendants should be at liberty to discontinue the supply of energy if and so long as the consumer should make default in payment in accordance with the agreement.

Now the hotel company have made a serious default, and a large sum is due from them to the defendants in respect of the past supply of current. The stipulations in this agreement would, if the plaintiff adopted it, be binding upon him; but he objects to pay the arrears. Therefore, naturally, he will have nothing to do with the agreement. It is not for me to say now, and I do not express an opinion about it one way or the other, whether he can be compelled to adopt that agreement, or whether he can only obtain a supply by entering into a new agreement with the defendants. But, if he does not choose to avail himself of the old agreement, the only other way in which he can obtain a supply is as being the "occupier" of the hotel. Now, his title in that character arises either under the confirmed provisional order of 1889 or under the general provisions of the Act of 1882, and the learned counsel for the plaintiff relied, I think, rather upon the provisions of s. 47 of the order of 1889. The first part of that section imposes on the defendants the duty of giving and continuing to give a supply of energy when required so to do by the owner or occupier of any premises within fifty yards from their distributing main, but that supply is to be in accordance with the provisions of the order. Now that, I suppose, extends to every owner and occupier within the defined limits. The subsequent portion of the section imposes obligations upon the owner and occupier. "Every owner or occupier of premises requiring a supply of energy" is to do certain specified things. The language, so far as I have read it, is as extensive as that which is used with reference to owners and occupiers in the preceding portion of the order, and it seems to me that primâ facie it must be taken to mean that every

owner or occupier who desires to avail himself of the provisions in the earlier part of the section, and to seek a supply from the undertakers, must on his part comply with the directions which are given in the subsequent portions of the order, which require him to serve a notice upon the undertakers specifying the premises in respect of which the supply is required, the maximum power required and so on, and to enter into a written contract with the undertakers.

I agree that, notwithstanding the wide language used, it may be that the other parts of the section, and the nature of the obligations imposed, shew that the words ought to receive a narrower interpretation. And it has been argued that the language used as to some of the obligations which are imposed shews that it does not apply to owners or occupiers who are not requiring a supply for the first time, or, at all events, to occupiers who became such at a time when there was an already existing supply of current to the premises. I need not on the present occasion say more than that I am not satisfied that such a limitation exists, and as at present advised I am inclined to think that every owner or occupier must fulfil all the conditions imposed by s. 47. But, if I am wrong in that view, I agree entirely with what Vaughan Williams L.J. has said as to the effect of s. 19 of the Act of 1882, and quacunque via I am of opinion that the occupier is not entitled as of right to a supply of electric current until he has entered into a contract with the defendant corporation. The plaintiff does not profess to have entered into such a contract, and therefore it seems to me that there is no ground for the injunction.

I will only add this—that if, as I think, the defendants have a legal right to cut off the electric current, the Court has no jurisdiction to interfere with them simply because they are actuated by the motive which has been suggested. It has been held by the House of Lords in *Bradford Corporation* v. *Pickles* (1) and subsequent cases that even the existence of malicious motive does not prevent a person from exercising his legal right, or give a title to an injunction against him. Here

(1) [1895] A. C. 587.

C. A. 1902

HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION.

the facts fall far short of establishing malice, and in my opinion there is no foundation for granting the injunction.

COZENS-HARDY L.J. I am entirely of the same opinion. The injunction which has been granted can be justified only on the ground of a breach, or a threatened breach, of some contract between the plaintiff and the defendants, or on the ground of a breach of some statutory duty imposed upon the defendants in favour of the plaintiff. Now, there is one contract in existence, namely, the old contract between the defendant corporation and the hotel company. Upon that contract the plaintiff does not rely, and for the best possible reason, namely, that under its express terms the defendants are entitled to cut off the supply of current by reason of the non-payment of the arrears due by the hotel company. No new contract with the defendants is even alleged by the plaintiff. But it is suggested, as I understand it, that a breach by the defendants of some statutory duty is threatened, and that this entitles the plaintiff to relief by way of injunction.

Now I will assume, without deciding the point, that the plaintiff is, by virtue of the form of the order appointing him receiver, to be deemed an "occupier" of the hotel. If he is not an "occupier" it seems to me plain that there is no statutory duty of the defendants towards him. But, if he is an "occupier," and treating him on that footing, I cannot find anything in the statute which entitles a person from the mere fact that he is in occupation of premises which are being already supplied with electric current to say, "You must continue this supply, although there is no contract between you and me, and in fact you are bound to continue it for at least seven days without any security from me." I prefer to base my judgment rather, as Vaughan Williams L.J. has done, upon s. 19 of the Act of 1882. I think that section contemplates an arrangement or a contract between the occupier and the undertakers, and that the words "entitled to a supply" mean entitled to a supply under and by virtue of a contract made between the occupier and the undertakers. The terms of the supply may vary. There is a maximum charge, and s. 20 prevents undue preference.

But within those limits it is left to the undertakers to make such bargains as they may think fit with the individuals who come to them for a supply of electric current. This, I think, was the view taken by Buckley J. in *Metropolitan Electric Supply Co.* v. *Ginder*. (1) The learned judge said (2): "Under s. 19, every person within such an area as this is entitled to a supply on the same terms on which any other person in the area 'is entitled under similar circumstances to a corresponding supply.' Now, that last expression, a person 'is entitled,' means, I think, is entitled by arrangements made between him and the company." No such arrangements have been made here; no contract is alleged now to exist between the plaintiff and the defendants. For these reasons I think the injunction granted by Kekewich J. ought to be dissolved, with, I suppose, the usual consequences as to costs, unless, of course, the parties desire to make an end of the action now.

Solicitors: *Deacon, Gibson, Medcalf & Marriott; S. J. R. Stammers.*

(1) [1901] 2 Ch. 799. (2) [1901] 2 Ch. 810.

W. L. C.

C. A.
1902
Feb. 24.

In re BURBIDGE.

Lunacy—Jurisdiction—Inquiry—Domiciled Foreigner temporarily in England.

The Court in Lunacy has jurisdiction to order an inquiry into the state of mind of a domiciled foreigner who is temporarily resident in England.

PETITION for an inquiry into the state of mind of Grace Ann Burbidge, an alleged lunatic. She was the widow of a citizen of the United States of America, and was domiciled there. She came over to England in June, 1901. During the voyage and after her arrival in England she manifested symptoms of insanity, and was placed in an asylum. Her property consisted mainly of real estate in the State of New Jersey, and she had no property in England, except perhaps a few personal chattels and some cash which she had brought with her. The petition was presented by her brother, a British subject who resided in Wales. The hearing was referred to the Court by Cozens-Hardy L.J., who felt some doubt as to the jurisdiction.

Newton Crane, for the petitioner. It is submitted that the Court has jurisdiction to direct the inquiry, though there is no very recent authority on the point. The object of such an inquiry is to benefit the lunatic, as well as to protect her property. The Court would not have to exercise any extra-territorial jurisdiction. *In re Houstoun* (1) is in favour of the jurisdiction, and so is *In re Bariatinski*. (2) In *In re Sottomaior* (3) the question was whether the Court would direct an inquiry as to the date when the lunacy of a domiciled Portuguese, who was residing in England, had commenced, and the Court refused to do that, though the Portuguese Court desired that it should be done. But the Court did direct the ordinary inquiry into the alleged lunatic's state of mind. He had real estate in Portugal, and his only property in England was a dividend of 208*l.*, payable under a composition deed. That

(1) (1826) 1 Russ. 312. (2) (1843) 1 Ph. 375.
(3) (1874) L. R. 9 Ch. 677.

case shews that the Court has jurisdiction to direct the inquiry in the present case. It is probable that the lunatic has some small personal estate in this country. There is no evidence about it, but she must have brought some trunks with her and some money for her voyage.

VAUGHAN WILLIAMS L.J. We are all of opinion that there is jurisdiction to direct the inquiry. If authority is needed, I think *In re Sottomaior* (1) supplies ample authority. Though in that case the Court did not grant an inquiry as to the commencement of the lunacy, they did order an inquiry into the alleged lunatic's then state of mind. And I think it is probable that this alleged lunatic has a few personal chattels in this country. It is not necessary to consider now what the consequences of the inquiry may be.

STIRLING and COZENS-HARDY L.JJ. concurred.

Solicitors: *Indermaur & Brown.*

(1) L. R. 9 Ch. 677.

W. L. C.

C. A.
1902
Jan. 23.

HUNT *v.* LUCK.

[1899 H. 110.]

Vendor and Purchaser—Adverse Title—Constructive Notice—Notice by Tenancy—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.

The occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights.

Actual knowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the vendor is constructive notice of that person's rights; but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all.

Decision of Farwell J., [1901] 1 Ch. 45, affirmed.

Barnhart v. *Greenshields*, (1853) 9 Moo. P. C. 18, followed.

Dictum of Jessel M.R. to the contrary in *Mumford* v. *Stohwasser*, (1874) L. R. 18 Eq. 556, 562, disapproved.

APPEAL by the plaintiff against the judgment of Farwell J. (1) dismissing the action as against some of the defendants.

The plaintiff, who was the real representative of her late husband, Dr. Hunt, and the tenant for life under his will, claimed to impeach some conveyances of twenty-seven freehold houses and land situate at Wimbledon, which purported to have been executed by her husband in favour of one Gilbert, an estate agent at Hastings, where Dr. Hunt resided.

The defendant Miss Luck was the real representative and the residuary legatee and devisee of Gilbert. The other defendants were his mortgagees of the property. The evidence shewed that the rents of the houses, twenty-five of which were let on weekly tenancies and the other two on tenancies from year to year, had been collected by one Woodrow, an estate agent at Wimbledon, and remitted by him direct to Dr. Hunt until July 10, 1897, after which date they were, by arrangement, remitted by Woodrow to Gilbert as agent for Dr. Hunt.

The rents were paid by Gilbert to Dr. Hunt till his death on

(1) [1901] 1 Ch. 45.

June 10, 1898, and were afterwards paid to the plaintiff till the death of Gilbert on September 6, 1898.

After the death of Gilbert, the plaintiff discovered that by a voluntary conveyance dated March 31, 1896, part of the property, and by a conveyance dated October 10, 1896, expressed to be made in consideration of 12,000*l.*, the receipt of which sum was thereby acknowledged by Dr. Hunt, the whole of the property, purported to be conveyed by him to Gilbert absolutely, and that in August, 1897, Gilbert had conveyed the property by way of mortgage to the defendant mortgagees. The title-deeds, which had been deposited by Gilbert with his bankers to secure an overdraft, were by his directions handed over to the mortgagees on completion.

The plaintiff alleged that the apparent signature of Dr. Hunt to the conveyances was a forgery, and, alternatively, that Dr. Hunt was at the date of the conveyances totally incapable of transacting business, and, alternatively, that Gilbert concealed the actual contents of the conveyances from Dr. Hunt, and represented them as being merely documents arranging the terms on which Gilbert was to collect the rents as agent, and that Gilbert fraudulently obtained possession of the title-deeds by representing that they were required for the purpose of the agency.

The plaintiff also alleged that the pretended purchase-money of 12,000*l.* had never been paid, that neither Gilbert nor the defendants ever took possession of the property, and that the mortgagees were guilty of negligence in omitting to make proper inquiries of the tenants, which inquiries would have elicited the fact that Dr. Hunt was the true owner and was in possession or receipt of the rents. There was evidence that in May, 1897, during the negotiations for the mortgages, the mortgagees employed an agent named Woodhams to value the property on their behalf, and that Woodhams on inquiry of the tenants was informed that the rents were paid by them to Woodrow. Woodhams did not pursue the inquiry further, or ascertain on whose behalf Woodrow was collecting the rents, nor did the mortgagees make any other inquiries on the point, the paper title being satisfactory.

C. A. 1902 HUNT v. LUCK.

The defendant Luck did not deliver a defence, and did not appear at the trial. The mortgagees denied the plaintiff's allegations, and also pleaded that they were purchasers for valuable consideration without notice of any of Gilbert's alleged frauds or of Dr. Hunt's alleged incapacity.

Farwell J. held that, even if the plaintiff's allegations of fraud by Gilbert were proved, the mortgagees had neither actual nor constructive notice of the fraud or of the title of Dr. Hunt. They were purchasers for value without notice, and their title must prevail against that of the plaintiff. The action was accordingly dismissed as against the mortgagees.

The plaintiff appealed.

W. F. Webster (*Upjohn, K.C.*, with him), for the plaintiff. It is admitted that the mortgagees had no actual notice of the title of Dr. Hunt; but it is contended that they had constructive notice. A purchaser is affected with constructive notice, not only when he wilfully shuts his eyes, but also when he neglects to make such reasonable inquiries as, if he had made them, would probably have brought to his knowledge a title adverse to that of the vendor. It would have been reasonable for the mortgagees to inquire of the tenants whether the mortgagor was really in possession of the property. If they had inquired as to the person for whom Woodrow was receiving the rents they would probably have discovered that they were paid to Gilbert as agent for Dr. Hunt: *Ogilvie* v. *Jeaffreson*. (1)

[COZENS-HARDY L.J. The law as to notice now depends upon s. 3 (2) of the Conveyancing Act, 1882.]

(1) (1860) 2 Giff. 353, 378.

(2) By s. 3, "(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless — (i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." "(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted."

In *Mumford* v. *Stohwasser* (1) Jessel M.R. said in effect that constructive notice of a tenancy is notice of the lessor's title. If *Barnhart* v. *Greenshields* (2), on which Farwell J. relied as laying down the law to the contrary, cannot be distinguished from the present case, it does not bind this Court.

[STIRLING L.J. Turner L.J. laid down the law in the same way in *Knight* v. *Bowyer*. (3) He said (4) that he quite concurred in the explanation given in *Barnhart* v. *Greenshields* (5) of what fell from him in *Bailey* v. *Richardson*. (6) And the same view is taken in Dart's Vendors and Purchasers, 6th ed. vol. ii. p. 975, and in Sugden's Vendors and Purchasers, 14th ed. pp. 548, 762.]

In Preston on Abstracts, 2nd ed. vol. iii. p. 400, it is said that "possession by a tenant is constructive notice of his lease, and of all the stipulations in his lease, and renders it incumbent on a purchaser to take notice of the nature and extent of the interest of the tenant, and if he be an undertenant, then, it is apprehended, of those persons to whom his rent is payable." If this is the rule as regards an undertenant and his lessor, it must equally apply as regards the original tenant and his lessor —that is, notice of possession by a tenant is constructive notice of the nature and extent of the interest of his lessor.

And, as regards s. 3 of the Conveyancing Act, the question is, what are reasonable inquiries? It is surely unreasonable that an intending purchaser or mortgagee should not inquire whether the vendor or mortgagor is in possession of the property. Sect. 3 does not say that in every event the purchaser who does not inquire shall be affected with notice. An exception is grafted on the old law.

[COZENS-HARDY L.J. referred to *Bailey* v. *Barnes*. (7)]

The test is, what is a reasonable inquiry to make—not what is a usual inquiry. Nor is the test whether a solicitor would be liable for negligence if he did not make inquiry: *In re Alms Corn Charity*. (8) In *Knight* v. *Bowyer* (3) it was held by

(1) L. R. 18 Eq. 556, 562.
(2) 9 Moo. P. C. 18, 32, 34.
(3) (1858) 2 De G. & J. 421, 449.
(4) Ibid. 451.
(5) 9 Moo. P. C. 34.
(6) (1852) 9 Hare, 734.
(7) [1894] 1 Ch. 25.
(8) [1901] 2 Ch. 750.

C. A. 1902 HUNT v. LUCK.

Turner L.J. that the purchaser of a reversionary interest in a mortgage of land, who knew that the rents were not received by the vendor, but by a trustee for persons to whom the vendor had granted annuities, was bound to inquire on whose behalf the trustee received the rents. If a purchaser does not make inquiry it will be assumed that the inquiry, if made, would have been truthfully answered. It would not have been a truthful answer if Woodrow had only said that he was receiving the rents for Gilbert. Sect. 3 does not mean that the purchaser who omits to make reasonable inquiries is to be affected by notice only of that which would necessarily have come to his knowledge if he had inquired; he is to be affected with notice of that which it is reasonably probable would have come to his knowledge.

Hughes, K.C., *Rufus Isaacs, K.C.*, and *Charles Church*, for the mortgagees, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion, the judgment of Farwell J. was quite right. He has, so far as I can see, dealt with the case without reference to the provisions of the Conveyancing Act, 1882. He stated what he considered to be the law as established by decisions, including those prior to the Conveyancing Act.

Speaking for myself, if we are to determine the question now raised with reference to the old law, I think that the conclusion of Farwell J. was right. In his judgment he, after quoting the older authorities, said (1): "The rule established by these two cases may be stated thus: (1.) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; (2.) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights." In the present case I do not understand that any one suggests, and, if it is suggested, in my opinion the suggestion is ill-founded, that there was actual knowledge that the rents were paid by the tenants to some person whose receipt would be inconsistent with the title of the mortgagor, Gilbert. We have, therefore, to apply the first of the rules stated by the learned judge. Now, what

(1) [1901] 1 Ch. 51.

does that mean? It means that, if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession —of the tenant who is in possession—and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession.

That, I believe, is a true statement of the law; and the only other matter to which I need allude is the case of *Mumford* v. *Stohwasser* (1), to which the attention of Farwell J. was called by the reporter after he had delivered his judgment in Court. Farwell J. gave an explanation of that case, namely, that in his view the passage in the judgment of Jessel M.R. (2), which appears to favour the idea that notice of a tenancy is notice of the title of the lessor, was, if the learned judge really said so, a slip of memory on his part. He did not profess to be laying down any new law; he only professed to be stating the old-established and unquestioned law. It is impossible for us to affirm the proposition so stated by him in the passage to which I have referred, unless we are prepared to disregard the other authorities, including the decision of the Privy Council in *Barnhart* v. *Greenshields* (3), which shew that notice of a tenancy has no operation whatever as giving notice of the title of the lessor of the tenant who is in possession. Of course, if you make inquiries and get information, then you are affected by notice, but not otherwise.

I will say a word or two as to the Conveyancing Act. We must look first at the definition clause, s. 2, sub-s. 8, of the Conveyancing Act, 1881, which provides that "'Purchaser,' unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property." Mr. Webster suggested that a purchaser for valuable consideration could only set up the defence that he had no notice when his vendor was himself in possession of the property. The definition clause shews that under the

(1) L. R. 18 Eq. 556. (2) L. R. 18 Eq. 562.
(3) 9 Moo. P. C. 32, 34.

C. A. 1902 HUNT v. LUCK. Vaughan Williams L.J.

Conveyancing Act that is not so, and I doubt whether it ever was so.

Now, passing from that to the Conveyancing Act, 1882, s. 3 deals with the question of notice. [His Lordship read sub-s. 1 of s. 3, and continued:—]

In my judgment, the only inquiry which ought reasonably to have been made here by the intending mortgagees was an inquiry to protect themselves against any right which the tenant might have in the subject-matter of the mortgage. I do not think that there is, for the purpose of ascertaining the title of the vendor, any obligation on the purchaser to make inquiries of the tenant in reference to anything but protection against the rights of the tenant. And I only desire to add that, in my judgment, on the facts of this case, as I take them from the statement in the report (1), if inquiry had been made of the tenants, the equitable title of Dr. Hunt and Mrs. Hunt would not have come to the knowledge of the intending mortgagees. All that they would probably have learned, if they had made inquiries of the tenants, would have been that the tenants paid the rent to Mr. Woodrow, a local agent. In my judgment, it is not true to say that the facts as to the equitable title of Dr. Hunt and Mrs. Hunt would have come to the knowledge of the mortgagees if they had made those inquiries. And, even if they had been told that the rents were collected by Woodrow on account of Gilbert, I do not see that that would have carried the matter any further. I have not looked sufficiently into the facts to see whether the matter was carried out by the mortgagees personally or by their solicitor. In so far as it was carried out by their solicitors, the second clause of sub-s. 1 of s. 3 applies. [His Lordship read the second clause, and continued:—]

Here, again, no one suggested that there was actual notice to the solicitors, and the observations which I have already made apply to the question what inquiries ought reasonably to have been made by the solicitors. And, in dealing with the question what inquiries ought reasonably to be made by the solicitor or other agent of a purchaser, it seems to me that it would be a

(1) [1901] 1 Ch. 45.

very strong thing to say that an inquiry ought reasonably to be made which is not advised in any of the standard text-books, and which would be inconsistent with the decisions prior to the Conveyancing Act, and has not received countenance from any decision subsequent to that Act.

I wish to call attention to sub-s. 3 of s. 3 of the Act, which says that "A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted." I refer to that sub-section only for the purpose of vouching what has been said in the course of the argument, namely, that, so far as this s. 3 is concerned, the practical result is that the law prior to the Conveyancing Act can only be used as a shield, and not treated as going beyond the law contained in the code-like definition in s. 3.

STIRLING L.J. I am of the same opinion, and I have really nothing to add to the reasons which have been given by Farwell J. and by my brother Vaughan Williams.

COZENS-HARDY L.J. I entirely agree. I cannot bring myself to hold that an inquiry ought reasonably to have been made which is not usual, which has not, so far as we are aware, ever been recommended by any text-book writer, and which has not even been suggested by any judge, except in that one passage in the judgment of Jessel M.R. in *Mumford* v. *Stohwasser*. (1) In my opinion the decision of Farwell J. was perfectly right, and the appeal should be dismissed with costs.

Solicitors: *Henry H. Fanshawe; Leslie & Hardy, for Sayer & Colt, Hastings.*

(1) L. R. 18 Eq. 562.

W. L. C.

KEKEWICH J.

1902

Jan. 21, 22.

In re BRADSHAW. BRADSHAW *v.* BRADSHAW.

[1901 B. 2451.]

Will—Power—Appointment Void for Remoteness—Covenant as to Mode of Execution of special Testamentary Power — Originating Summons — Administration—Costs out of Estate—Costs "as between Solicitor and Client" — Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 29 (*Rules of Supreme Court, January*, 1902, *r.* 10).

In applying the doctrine of election as to taking under or against an instrument, there is no distinction in principle between an appointment which is void because it is in excess of the power and an appointment which is void as transgressing the rule against perpetuity.

A covenant to exercise a special testamentary power in a particular way is void.

W. B. by his will gave property upon trust for the children of A. B. as A. B. should by will appoint, and in default of appointment for the children equally. A. B. covenanted with the trustees of his marriage settlement to exercise the power in a particular way. A. B. by his will made an appointment to his son for life with an appointment over which was void as transgressing the rule against perpetuity, and he also made a bequest of property of his own in favour of the son. The covenant was not satisfied by the terms of the will:—

Held, that the son of A. B. was bound to elect between the interest bequeathed to him in the property of A. B. and his interest in default of appointment under the will of W. B.:

Held, also, that the covenant was void, and therefore could not be enforced against the estate of A. B.

In re Warren's Trusts, (1884) 26 Ch. D. 208, distinguished.

ADJOURNED SUMMONS.

William Bradshaw by his will, dated January 22, 1853, devised and bequeathed a portion of his residuary real and personal estate to a trustee upon trust to pay the yearly rents and profits thereof to his son Arthur Bradshaw during his life, and after his decease in trust for all and every or such one or more exclusively of the other or others of the children or other issue of his said son Arthur Bradshaw (such other issue to be born within the limits allowed by law), for such estate or estates, and if more than one in such proportions and with such limitations over for the benefit of the said children or

other issue or some or one of them, and with such restrictions and in all respects in such manner as his said son Arthur Bradshaw should by his will or any testamentary writing appoint, and in default of such appointment in trust for all and every the children and child of his said son Arthur Bradshaw, who being a male or males should attain the age of twenty-one years, and who being a female or females should attain that age or marry, equally to be divided between such children, if more than one, as tenants in common, their respective heirs, executors, administrators, and assigns respectively, and if there should be but one such child, then the whole for that one, his or her heirs, executors, administrators, and assigns respectively.

William Bradshaw died on July 12, 1855, and his will was proved on September 26, 1855.

Arthur Bradshaw was twice married. By his first marriage he had two children, Arthur Evelyn Bradshaw and Margaret Beatrice Good. By his second marriage he had two children, Moey Violet Frances Bradshaw and William Pat Arthur Bradshaw, who were both infants.

Previously to the second marriage two deeds of covenant were executed by Arthur Bradshaw. By the first of these deeds, dated February 7, 1893, and made between himself of the first part, Arthur Evelyn Bradshaw of the second part, Margaret Beatrice Good of the third part, and William Graham Bradshaw of the fourth part, he in effect covenanted to appoint to his son and daughter not less than one-third part of the property subject to the power of appointment given to him by the will of William Bradshaw. In the result no question arose as to the effect of this covenant.

By the second of these deeds, dated February 8, 1893, and made between Arthur Bradshaw of the first part, Maud Annette Letitia Elizabeth, his then intended wife, of the second part, and Francis Cooper Dumville Smythe, Dudley Ferrars Loftus, and William Graham Bradshaw of the third part (being the settlement made on Arthur Bradshaw's second marriage), Arthur Bradshaw covenanted with the parties of the third part that if the said intended marriage

KEKEWICH J.
1902
BRADSHAW, *In re.*
BRADSHAW v. BRADSHAW.

should take place, he would, in exercise of the power reserved to him by the will of William Bradshaw, by will appoint and direct that if any issue of the said marriage should survive him, Arthur Bradshaw, a part or share of the several trust real and personal estates by the will of William Bradshaw directed to be held in trust for Arthur Bradshaw and his children, not being of less value at the time of the decease of Arthur Bradshaw than 6000*l.*, should from his death be held by the trustees or trustee for the time being of the will of William Bradshaw upon trust for the child or children or issue of the said marriage (such issue to be born within twenty-one years from the death of Arthur Bradshaw) in such shares and proportions as Arthur Bradshaw should appoint; and Arthur Bradshaw further covenanted with the parties of the third part that, in case there should be issue of the marriage living at his death, he would not exercise the power of testamentary appointment given to him by the will of William Bradshaw over the trust premises thereby settled in favour of his children or issue by any other marriage, so as by any means to reduce the part or share of the same trust premises which he had thereby covenanted to appoint in favour of the child or children of the then intended marriage to a less amount than the sum of 6000*l.*, or to postpone the vesting of that part or share beyond the period of the death of him, Arthur Bradshaw.

Arthur Bradshaw by his will dated April 9, 1896, made before the birth of his youngest child, in execution of the power of appointment conferred by the will of William Bradshaw, appointed certain freeholds to Margaret Beatrice Good for her life, and after her death to her children "then living"; but if no child should attain a vested interest, then in the same manner as the remainder of the property thereby appointed. The testator then directed and appointed that the remaining property subject to the power of appointment and all other his real and personal estate should be held in trust as to three equal fifth parts for the benefit of his son Arthur Evelyn Bradshaw as thereinafter declared, and as to the remaining two equal fifth parts for the benefit of his daughter Moey Violet Frances Bradshaw. As to the three-fifths, the testator

declared that it should be held upon trust for A. E. Bradshaw for life, and after his death upon certain trusts in favour of his children or issue "then living," and in the event of his son leaving no child who should live to attain a vested interest, then upon the trusts declared concerning the two-fifths. As to the two-fifths the testator directed that the same should be held upon certain trusts for the benefit of his daughter M. V. F. Bradshaw during her life, and after her death upon certain trusts in favour of her children "then living," and in the event of his said daughter leaving no child who should attain a vested interest, then upon the trusts declared concerning the three-fifths. The testator appointed his son A. E. Bradshaw and another executors of his will.

The testator Arthur Bradshaw died on March 22, 1900, and his will was proved by A. E. Bradshaw alone on June 23, 1900.

It was not disputed that the appointments made by the will of Arthur Bradshaw subsequent to the life interests of Mrs. Good, A. E. Bradshaw, and M. V. F. Bradshaw were respectively void for remoteness. The gifts in favour of A. E. Bradshaw and M. V. F. Bradshaw and their children or issue extended to and comprised property of the testator Arthur Bradshaw in addition to the property settled by the will of William Bradshaw; and accordingly the question arose whether A. E. Bradshaw and M. V. F. Bradshaw were bound to elect between the interests they took in Arthur Bradshaw's property and their interests in default of appointment under the will of William Bradshaw.

Arthur Evelyn Bradshaw had four children, all of whom were infants. Mrs. Good had one child, who was an infant.

This summons was taken out by Arthur Evelyn Bradshaw, as plaintiff, against the trustees of the indentures of February 7 and 8, 1893, Maud A. L. E. Bradshaw, Margaret B. Good, Moey Violet F. Bradshaw, William Pat Arthur Bradshaw, the four infant children of the plaintiff, and the infant child of Mrs. Good as defendants, for the determination of numerous questions arising in the administration of the estate of Arthur Bradshaw, and in particular (*a*) whether any case of election was raised by the will of Arthur Bradshaw, and (*b*) for the

KEKEWICH J. 1902 BRADSHAW, *In re.* BRADSHAW *v.* BRADSHAW.

direction of the Court as to whether any and what provision ought to be made out of the estate of Arthur Bradshaw for the purpose of satisfying the covenants contained in the indenture of February 8, 1893, in case the Court should be of opinion that such covenants remained unsatisfied.

The question of election was first argued.

Warrington, K.C., and *R. J. Parker*, for the plaintiff. So far (if at all) as the point affects the plaintiff's interest, we submit that no case of election arises. Where an appointment in a will is void because it transgresses the rule of law against perpetuity, the doctrine of election cannot be applied, because, if it were applied, the Court would be indirectly giving effect to that which the policy of the law prohibits: *In re Warren's Trusts*. (1)

Gatey, for the four children of the plaintiff. It is submitted that a case of election arises. There can be no difference in principle between an appointment which is void for remoteness and an appointment which is void because it is in excess of the power, as, for example, in favour of a person who is not an object of the power: see the observations of the Master of the Rolls in *Tomkyns* v. *Blane*. (2) In the latter case (i.e., where the appointment is to a stranger) it is clear that a person claiming as in default of appointment, and also taking benefits directly under the will, is bound to elect: *Whistler* v. *Webster* (3), referred to in *In re Brooksbank* (4); and there is no reason why the same rule should not prevail in the former case also. In *Woolridge* v. *Woolridge* (5) it was held that where there is an absolute appointment by will in favour of a proper object of the power, and the appointment is followed by attempts to modify the interest in a manner which the law will not allow, the Court reads the will as if these passages were swept out of it for all intents and purposes, including any question of election. But that case appears to be in direct conflict with *Tomkyns* v. *Blane* (6), where the appointee in a similar case insisted that he

(1) 26 Ch. D. 208.
(2) (1860) 28 Beav. 422, 428.
(3) (1794) 2 Ves. Jr. 367; 2 R. R. 260.
(4) (1886) 34 Ch. D. 160.
(5) (1859) Joh. 63.
(6) 28 Beav. 422.

took the settled property discharged from void restrictions, and the Court held that he must elect whether he would take under or against the will; and it is submitted that, so far as it is in point, that case ought to be followed here. But it is to be observed that those decisions were based on the fact that there was an absolute appointment in the first instance, and, so far as they are adverse, they are distinguishable on that ground. The observation of James V.-C. in *Wollaston* v. *King* (1), to the effect that the Court will not aid by the doctrine of election or otherwise an attempt to create a power in violation of the rules of law, was a mere dictum; and if *In re Warren's Trusts* (2), which is the most formidable authority against me, is carefully examined, it will be seen that this point did not really arise for decision. [He referred also to *In re Wheatley.* (3)]

Hughes, K.C., and *Stewart-Smith*, for Moey V. F. Bradshaw. The Court will not apply the doctrine of election so as to give effect to an illegal gift. That is the principle upon which the decision of Pearson J. in *In re Warren's Trusts* (2) is founded, and it is submitted that it is a sound principle. The clear distinction between the case of an appointment which is void for remoteness and an appointment to a stranger is that in the one case the Court, if it applies the doctrine of election, will be aiding an infringement of a rule of law, whereas in the other case it will merely be remedying a mistake of the appointor. In Farwell on Powers, 2nd ed. p. 383, it is said that the Court will regard with particular disfavour any modifications or conditions attached to an appointment which fail by transgressing the rules against perpetuity, or the like, and that it is not for the Court to aid attempts of that nature either by the application of the doctrine of election or otherwise—adopting the language of James V.-C. in *Wollaston* v. *King.* (1) *In re Warren's Trusts* (2) is a direct authority cited with approval by learned text-writers, and it has been considered and followed as an authority by the Court of Appeal in Ireland in the case of *In re Handcock's Trusts.* (4) In the observations of the Master

(1) (1869) L. R. 8 Eq. 165, 175.
(2) 26 Ch. D. 208.
(3) (1884) 27 Ch. D. 606.
(4) (1889) 23 L. R. Ir. 34.

KEKEWICH J. 1902 BRADSHAW, *In re.* BRADSHAW *v.* BRADSHAW.

of the Rolls in *Tomkyns* v. *Blane* (1) the fact that there is no rule of law against excessive appointments is overlooked.

[They referred also to *Cooper* v. *Cooper*. (2)]

Renshaw, K.C., and *Vaughan Hawkins*, for Mrs. Good.

E. Beaumont, for the child of Mrs. Good.

Hull, for the trustees of the marriage settlement and the widow.

P. O. Lawrence, K.C., and *G. Cave*, for the son by the second marriage.

KEKEWICH J. The question is whether what has occurred here raises a right or responsibility of election. Although, perhaps, the matter is somewhat elementary, yet it is well to consider what a right or responsibility of election is. The authorities which have been cited shew sufficiently the nature of the doctrine of election. In the case of *In re Brooksbank* (3) Kay J., after referring to *Whistler* v. *Webster* (4), says this: "When a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power, that is to say, in fact, to exercise a power which he has not got; that if to the person who would be defeated by that gift free disposable property belonging to the testator is given by the same instrument that raises a case of election. I have always understood that when a person coming to claim under an instrument says, if it be a will, 'pay me the legacy,' or 'hand over to me the particular property given to me by that instrument,' the executors have the right to say 'you must conform to all the provisions of the instrument.' And if the instrument also disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. In short the rule may be stated in this form, that no one can take under and against the same instrument, but taking under it is bound to fulfil all its provisions."

(1) 28 Beav. 422.
(2) (1874) L. R. 7 H. L. 53.
(3) 34 Ch. D. 163.
(4) 2 Ves. Jr. 367; 2 R. R. 260.

That is the learned judge's account of the doctrine of election, and it is useful for the present purpose. It is important to remember on what the doctrine is founded. It has been argued that if the doctrine is applied to this case, the Court will be, in some way or other, managing to support a gift which the law declares void, and it is said, on the authority of some cases to which I will refer, that the Court will not uphold such a mischievous result as that a testator may by means of the doctrine of election enforce what he has no right to enforce. That view seems to me to be not altogether a correct one, and I think that, so far as it is incorrect, it is disposed of by the statement of the law by Lord Cairns in moving the judgment of the House of Lords in *Cooper* v. *Cooper* (1) (a case which in other respects need not be referred to): "The rule, as was said during the argument at the bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will." I am not going to suppose that this testator wished to fulfil this gift, which the law did not enable him to fulfil, by the doctrine of election or anything depending on it. If the doctrine of election applies, it is because of those high principles of equity of which Lord Cairns speaks. The testator Arthur Bradshaw had a power to appoint among children. He purported to exercise the power so as to give to persons to whom the law would not allow him to give, by reason of the rule against perpetuities, and therefore the appointment to those persons was bad. The result is that the property which he purported to dispose of goes to those who, under the original will of William Bradshaw, take in default of the exercise of the power of appointment; but to those very persons Arthur Bradshaw has given what Kay J. refers to as "free disposable property"—property which was his own and which he might give, in a legal manner, as he pleased; the result being that those persons who take in default of appointment are themselves

(1) L. R. 7 H. L. 67.

KEKEWICH J. 1902 BRADSHAW, *In re.* BRADSHAW *v.* BRADSHAW.

beneficiaries under Arthur Bradshaw's will. If the doctrine of election applies, it compels them to make good out of what they take the interests which are defeated by their insisting, as they do, upon the appointment being void for remoteness. I do not myself see what the difference in principle is between an appointment becoming void for that reason, and an appointment such as is mentioned by Kay J., referring to *Whistler* v. *Webster* (1), to persons who are not objects of the power. Whether the appointment fails because it offends against some rule of law, or whether it fails because it offends against the rule of construction of the will, which is that the donee may appoint to certain persons and no others, seems to me, with all deference to those who entertain a contrary opinion, not to matter one jot. In either case it fails, and on its failing the property goes to those who take in default of appointment. But it has seemed otherwise to other judges, and I have to determine whether I can properly follow those other judges. If I had a direct expression of opinion by a judge, or still more by the Court of Appeal, I should be bound to follow it and leave it to some higher tribunal to set me right. But I am by no means sure that there is any such expression. The point is noticed by James V.-C., whose dictum on a question of equity is, I need not say, entitled to the highest respect, in *Wollaston* v. *King*. (2) But certainly this is no more than a dictum. The question he had to decide, which did not at all raise the question which is to be decided in this case, is accurately stated in the third paragraph of the head-note: "*Held*, also, that the rule as to election was applicable only as between a gift under a will and a claim dehors the will and adverse to it, and not as between one clause in a will and another clause in the same will, and that therefore the daughters were not put to their election." That was the point he had to decide. But there was likewise an appointment void for remoteness, and it was held that the appointed property went over to the persons claiming in default of appointment, and James V.-C. said (3): "It is also material that the reason why

(1) 2 Ves. Jr. 367; 2 R. R. 260. (2) L. R. 8 Eq. 165.
(3) L. R. 8 Eq. 175.

the gift fails is that there was an attempt to create a power in violation of the rules of law"; and then he adds: "I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise." That is not a decision. It is an observation made in reference to a point which was not before the Vice-Chancellor, and I do not think I can regard it as binding. The only other case in which the point has been dealt with is *In re Warren's Trusts.* (1) There Pearson J. really had not the point directly before him in the general discussion of the case. When he came to the end, there was apparently a point raised by Mr. Everitt, who referred to *Wollaston* v. *King* (2), and Pearson J. said this (3): "How can there be any question of election? I must read the will as if the invalid appointment were not in it at all. The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not ex facie void. In the present case it is the law which disappoints the appointee. The gift is void ex facie." He says that election does not apply to this case because he has not got in the will that which raises it, and he says he has not got that because the gift being ex facie void he is bound to read the will as if it were not there. With great respect to the learned judge, I cannot help thinking there is a slip in his conclusion. You cannot say, as it seems to me, that the gift is not in the will. The gift is in the will, and is void, and because it is void the case of election arises; and if I am right in saying that there is no substantial distinction between an appointment to a person not an object of the power and an appointment to a person who cannot take because of the law against perpetuities, then the doctrine of election must be applied. There was a case in Ireland of *In re Handcock's Trusts* (4), which is entitled to the greatest respect, distinctly following what was supposed to have been held by Pearson J. in *In re Warren's Trusts* (1), and by James V.-C. in *Wollaston* v. *King* (2), and yet it is my duty not to bind myself by an authority which is not binding, if I cannot reconcile it with

(1) 26 Ch. D. 208.
(2) L. R. 8 Eq. 165.
(3) 26 Ch. D. 219.
(4) 23 L. R. Ir. 34.

KEKEWICH J. 1902 BRADSHAW, *In re.* BRADSHAW v. BRADSHAW.

what I conceive to be the doctrine of the Court. I think that, as in the case of an appointment to a person not an object of the power a case of election is raised, so in the case of an appointment such as this which is void for remoteness, a case of election is raised. There must be a declaration that the persons who take in default of appointment must elect between what they so take and their interests in the property of the testator Arthur Bradshaw which passed by his will.

His Lordship having held that the gifts in the will did not operate as a satisfaction of the covenant contained in the deed of February 8, 1893, the question was argued whether the covenant was enforceable against the estate of the testator, Arthur Bradshaw.

Warrington, K.C., and *R. J. Parker*, for the plaintiff. It is submitted that a covenant to exercise a special testamentary power in a particular way is bad in law and cannot be enforced. There appears to be no direct authority upon the point, but the current of judicial opinion is in favour of that view: *Palmer* v. *Locke* (1); *Thacker* v. *Key* (2); Farwell on Powers, 2nd ed. p. 408.

[KEKEWICH J. referred to *Bulteel* v. *Plummer*. (3)]

A power of this kind is fiduciary, and to be exercised only by a revocable instrument.

P. O. Lawrence, K.C., and *G. Cave*, for the son by the second marriage. The covenant is good in law, and damages are recoverable under it, as in *In re Parkin*. (4) That was a case of a general power, and is therefore cited only in reference to the measure of damage. If the covenant were in favour of the donee, and in that sense fraudulent, or for an immoral purpose, no doubt the Court would decline to enforce it. But in this case the covenant was part of a family arrangement of a straightforward and beneficial character, and the Court always upholds such arrangements: Farwell on Powers, 2nd ed.

(1) (1880) 15 Ch. D. 294.
(2) (1869) L. R. 8 Eq. 408.
(3) (1869) L. R. 8 Eq. 585; (1870) 6 Ch. 160.
(4) [1892] 3 Ch. 510.

p. 421. It is settled law that the donee of a power may release it, and if so he may covenant not to exercise it: *Coffin* v. *Cooper*. (1)

KEKEWICH J. A general power of appointment is broadly distinguishable from property, but in its practical results, and in what I may call its market value, it is really equivalent to property. The donee may deal with it as he pleases. He may not only release it, but may sell it, or bind himself to exercise it in any way he pleases. This is equally true whether the power is to be exercised by deed, by deed or will, or by will only. In the last case, of course, there is more practical risk, because a man cannot make a will which will operate previously to his death. But no legal difficulty arises, and cases frequently occur where a man has a general power of appointment and deals with it, either by covenant or otherwise, as property—that is to say, he treats the subject of the power as property over which he has control. But when the power is a special one you have a different subject altogether. What is a special power? The most familiar instance (for there are many others) is a power of appointment amongst children. Such a power as commonly given to parents is intended, not to make a provision for the children, for that is done by the gift in default of appointment, but to confide to the parent the determination in what shares and proportions the children shall take—whether, for example, if women, they shall take for their separate use with or without restraint on anticipation, or, if men, shall take life interests determinable on bankruptcy. It is a discretion vested in the parent for determining what the particular provision shall be. That, as it seems to me, is nearly akin to a trust, and might well be described as a trust, but at all events it is a fiduciary power. Is it right that a man having that fiduciary power should bind himself to deal with it in any particular manner? If it were by deed or by deed or will, the case might be more difficult; but where it is a power to appoint by will, it seems to me to be clear that the intention of the person creating such a power, whether by settlement or

(1) (1865) 2 Dr. & Sm. 365, 375.

KEKEWICH J. 1902 BRADSHAW, *In re.* BRADSHAW *v.* BRADSHAW.

by will, is that the donee of the power shall keep the exercise of it under his control until the time of his death. A will being revocable may be altered from time to time, and it is common knowledge that the exercise of powers is continually altered with reference to the different events of family life. It seems to me that to say that a person having a power to appoint by will may bind himself to exercise it in a particular way is to defeat the object of the creation of the power, and to put the donee in a position to do the very thing which the settlement must be taken to say he shall not do. There is no real authority upon the point, and therefore I have stated what I conceive to be the principle. But there are certain guides. The first case bearing on it is the case of *Bulteel* v. *Plummer* (1), where there had been a covenant to exercise a special power which was aptly described as a power of distribution, and it was held that, notwithstanding that the appointment was made in pursuance of a covenant to appoint, the power might be well exercised. Lord Hatherley (2) said this: "A question further arises, whether this was a good covenant on which damages could be recovered, as to which I desire to say nothing; but I think that to hold such an appointment bad as a device would be to strain the doctrine as to improper appointments too far." All we have, therefore, is that the point occurred to a learned judge of great eminence and experience, and that he held that it was not necessary for him to dispose of it. James L.J. was a party to the judgment, but I do not see that he noticed this point. But it had come before him in *Thacker* v. *Key* (3), and there he expressed a distinct opinion. He says (4): "Now, if it had been necessary to determine that point, I think I should have had very little difficulty in holding such a covenant to be illegal and void. The testator is the donee of a testamentary power, which was to be exercised by him as a trustee. It was a fiduciary power in him to be exercised by his will, and by his will only; so that, up to the last moment of his life, he was to have the power of dealing with the fund as he should think it his duty to deal

(1) L. R. 6 Ch. 160.
(2) Ibid. 163.
(3) L. R. 8 Eq. 408.
(4) Ibid. 414.

with it, having regard to the then wants, position, merits, and necessities of his children." James V.-C. there stated in cogent language what I have attempted to say. The only other case is *Palmer* v. *Locke* (1), before the Court of Appeal, and there Brett L.J. made a more direct statement of his opinion, though again it was not necessary to decide the point judicially. He says (2): "It seems to me that although there is no consideration given for the covenant it is not a binding covenant, because it would be contrary to public policy to allow a person in the position of a trustee to enter into such a covenant so as to bind himself." That is in support of the view that the covenant is wholly void, and that no remedy is available for the breach of it. Cotton L.J. did not concur, but he did not differ; he merely reserved his opinion. It is to be remarked that James L.J. was a party to the decision, and that he said nothing upon that view of the case. The explanation may be that he had already had the point before him, and that delivering the first judgment he did not notice a point which did not directly arise. It seems to me that I have a substantial amount of opinion or inclination of opinion in favour of the view I take, and that the safe and right thing is to say that a covenant of this kind is bad and cannot be sued on.

Mr. Lawrence makes two remarks which ought to be noticed. First, he says that this is a family arrangement. The Court has gone far in upholding family arrangements, and the doctrine goes so far back that I think it would be difficult to find when it was first introduced. But Mr. Lawrence has not cited any decision in which the doctrine has been applied to a case such as the present one. Then, again, he called my attention to the case of *Coffin* v. *Cooper*. (3) It is quite true that it is possible to get rid of a good deal of the doctrine of fiduciary power. It has been held, and usefully held, that a power of this kind can be released. A man can say in a proper, solemn manner, "I will not exercise the power at all," with the result that he does then and there confer upon every one

(1) 15 Ch. D. 294. (2) 15 Ch. D. 301.
(3) 2 Dr. & Sm. 365.

KEKEWICH J.

1902

BRADSHAW, *In re.* BRADSHAW *v.* BRADSHAW.

of his children an equal portion of the settled property. He does in effect covenant that the power shall not be exercised. But the answer is that the release of a power depends on a foundation of its own. There was a time when it was a question how far a power of this kind can be released. The question has now been decided, and the decision is found convenient, but I do not think it ought to be carried further. It would be carrying it a long way to say that because a man may release a power, therefore he may covenant to exercise it in a particular way.

The question of costs being then mentioned,

HIS LORDSHIP said that it was his practice on the hearing of an originating summons of this kind, brought by trustees, or brought by a beneficiary and adopted by the trustees as useful for solving questions in administration of their trust, to allow the costs of all parties out of the estate as between solicitor and client. It had been suggested that in view of the new rule on the subject (rule 10 of the Rules of the Supreme Court, January, 1902, substituted for Order LXV., r. 27, sub-r. 29), it was no longer necessary to use the words "as between solicitor and client." His Lordship read the rule, and said that it seemed to him that the rule did not do away with the necessity for directing, on an application of this kind, that the costs should be taxed and paid as between solicitor and client, and he believed, and had reason to believe, that if the costs were simply directed to be paid out of the estate, the taxing master would not allow all the costs payable as between solicitor and client.

Solicitors: *Kingsford, Dorman & Co.; Smythe & Brettell.*

C. C. M. D.

In re HOWGATE AND OSBORN'S CONTRACT.

KEKEWICH J.

1902

Jan. 25.

[1901 H. 3377.]

Deed—Alteration—Name of Party—Misdescription—Mortgage—Reconveyance—Married Woman — Trustee Mortgagee — Concurrence of Husband — Separate Acknowledgment.

Upon a sale of freehold property the abstract of title delivered to the purchaser commenced with a mortgage to three persons, of whom the third was described as "William" G. It appeared from the original deed that the name "William" had been erased, and the names "Edward Thomas" substituted. The alteration was made after execution, but it was not known when or by whom. It was proved that the person described as William G. was really Edward Thomas G., and that the misdescription was due to inadvertence:—

Held, that the alteration was immaterial, and, in the absence of fraud, did not avoid the deed.

The mortgage was dated in 1878 and was granted to trustees; and in 1896, upon payment of the mortgage debt, the property was reconveyed by the sole surviving trustee, who was a married woman:—

Held, that under s. 16 of the Trustee Act, 1893, she was competent to reconvey without the concurrence of her husband and a separate acknowledgment.

THIS was a vendor's summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the purchaser's requisitions and objections had been sufficiently answered, and that the vendor had shewn a good title according to the contract. By an agreement in writing, dated August 26, 1901, the respondent agreed to purchase certain freehold property in Leeds at the price of 1900*l.*, and an abstract of title was sent to the purchaser in due course. The abstract commenced with a mortgage for 1000*l.* given by one George Lax to three mortgagees, described in the abstract as "Martha Milner of Thorner in the said county of York widow Ann Booth the wife of Joah Allen Booth same place schoolmaster and William Gray of Morwich Hall in the parish of Barwick-in-Elmet in the county of York gentleman third part." In the operative part of the deed the mortgagees were described as the said parties thereto of the third part. Upon comparing the abstract with the original deeds it was found that, although the name of the

KEKEWICH J.

1902

HOWGATE AND OSBORN'S CONTRACT, *In re.*

third mortgagee appeared in the abstract as "William Gray," in the deed the name "William" had been erased and the names "Edward Thomas" inserted. It also appeared that the deed had never been executed by the mortgagees. The purchaser by his requisitions asked for some explanation of this alteration. After some correspondence the vendor furnished the purchaser with two statutory declarations, one by Mr. J. S. Lawson, the solicitor who prepared the deed, and one by Ann Booth, the sole surviving mortgagee. Mr. Lawson stated in effect that in 1877 he was managing clerk of Messrs. Bulmer & Son, solicitors, of Leeds, and that he was instructed to prepare a draft mortgage for 1000*l.* from George Lax to William Milner's trustees on property in Cambridge Road, Leeds (being the property in question); that he knew from repute that such trustees were the widow, Martha Milner, her daughter, Ann Booth, and a gentleman named Gray, who lived at Morwick Hall, in the parish of Barwick-in-Elmet, whose Christian name he did not know; that in preparing the draft mortgage he inserted the names of Martha Milner and Ann Booth, but left a blank for the name of the other mortgagee; that subsequently he must have been wrongly informed that the other mortgagee was William Gray, of Morwick Hall, and that he filled in that name in the blank space in the draft; that the draft still bore the name of William Gray; that the deed was executed and registered in that name, and that that name had been repeated in recitals of the mortgage in subsequent deeds; that he now found that the name of William Gray in the mortgage deed had been altered to Edward Thomas Gray, but when or by whom he was unable to say; that he knew from his own personal knowledge that the 1000*l.* was part of the trust moneys of William Milner, deceased, and that his only trustees were his widow, Martha Milner, his daughter, Ann Booth, and his friend, Edward Thomas Gray, of Morwick Hall; that no person other than Edward Thomas Gray had ever lived at Morwick Hall during the last forty years; and that the name of William Gray was inserted in the mortgage deed and repeated in the subsequent deeds by mistake for Edward Thomas Gray.

Mrs. Booth stated that her father, William Milner, appointed her mother, herself, and his friend, Edward Thomas Gray, of Morwick Hall, the trustees of his will; that on January 1, 1878, they lent 1000*l.*, part of the trust funds, to George Lax on security of property in Cambridge Road, Leeds; that her mother died on August 29, 1888, and Edward Thomas Gray on October 11, 1896, leaving her the sole surviving mortgagee; that as such sole surviving mortgagee she received the 1000*l.* and released the property to C. W. Howgate (the vendor) on November 23, 1899; that she had known Edward Thomas Gray for the last forty years, and had never known a "William Gray" of Morwick Hall; that the name "William Gray" was inserted in the mortgage deed and subsequent deeds by inadvertence, and was meant for Edward Thomas Gray.

The purchaser was not satisfied with these declarations, and he further objected that Mrs. Booth, being a married woman trustee, had no power to reconvey the property without the concurrence of her husband and a separate acknowledgment. This summons was taken out by the vendor to try the validity of these objections.

The question as to the alteration of the deed was first argued.

P. O. Lawrence, K.C., and *R. J. Parker*, for the vendor. The alteration of the name in the deed was made after registration, and therefore the presumption that the alteration was made before execution is rebutted; but this is an immaterial alteration. All that we have to shew is that William Gray is identical with Edward Thomas Gray, and the purchaser ought to be satisfied with the statutory declarations upon this point. An immaterial alteration made in a deed after execution, unless made fraudulently, does not avoid the deed: Elphinstone, Norton and Clark on Interpretation of Deeds, pp. 32, 33; Taylor on Evidence, 9th ed. vol. ii. p. 1195; *Aldous* v. *Cornwell* (1); *Suffell* v. *Bank of England*. (2)

H. Greenwood, for the purchaser. If the alteration is made to correct a mere clerical error, that does not affect the validity

(1) (1868) L. R. 3 Q. B. 573. (2) (1882) 9 Q. B. D. 555.

KEKEWICH J. 1902 HOWGATE AND OSBORN'S CONTRACT, *In re.*

of the deed, but the change or striking out of the name of one of the parties is a material alteration. The test is, Is it the same deed? If the alteration changes the relationship of the parties in any way, it is a material alteration. This is a contract with A., B., and C., and the substitution of X for C. alters the contract, and is therefore material: *Suffell* v. *Bank of England* (1); *Ellesmere Brewery Co.* v. *Cooper*. (2)

KEKEWICH J. It is established that a material alteration in a written instrument does and an immaterial alteration does not avoid it. The rule was first laid down, though not precisely in these words, with reference to deeds conveying freehold property; but it has been discussed in many cases, with the result that the rule as now established is held to be applicable to all written instruments, and is not confined to deeds of purchase and sale of land. It must be taken, however, with this qualification, that, in considering whether an alteration is material or not, you must have regard to the particular instrument to see what its purport is and what its office is. That is the obvious conclusion from the case of *Suffell* v. *Bank of England* (1), where the Master of the Rolls (Sir George Jessel) and the Lords Justices who took part in the decision, and particularly Cotton L.J., discussed the particular nature of a Bank of England note to shew that the alteration there complained of was material, though that particular alteration might not have been material in another instrument.

Now, I have to consider here a deed of conveyance—a conveyance by way of mortgage, but still a deed of conveyance. The conveyance purported to be made to three persons, one of them being described as William Gray, whereas he ought to have been described as Edward Thomas Gray. He and the other two persons named were parties of the third part, and throughout the rest of the deed those parties are always referred to as the parties of the third part, and William Gray is never mentioned again. But, later, without any intention of fraud or anything of that kind, William was erased, and Edward Thomas was substituted.

(1) 9 Q. B. D. 555. (2) [1896] 1 Q. B. 75.

Is that a material alteration? In one view it can hardly be said to be otherwise than essentially material. The conveyance is to two persons and William Gray. A conveyance to two persons and Edward Thomas Gray is an entirely different conveyance, and even if William Gray could be treated as non-existent, you have a conveyance to two as joint tenants instead of to three, which would alter the legal estate. Then, again, as to the whole deed. I do not dwell upon all the details, but take the covenant for payment. The covenant is for payment to two persons and William Gray, which is obviously a different thing from a covenant for payment to two persons and Edward Thomas Gray. As to the proviso for redemption a similar remark applies, and so throughout as to the other provisions.

It is clear, therefore, that if Edward Thomas Gray had been put in in the first instance it would have been a very different deed from a conveyance to William Gray; and it may well be argued, and indeed it has been argued, that when you substitute Edward Thomas Gray for William Gray you are making an alteration in the deed which is and must be material. I think there is an answer to that consisting in this, that the deed took effect from the moment of its execution. The conveyance was to two persons and William Gray. William Gray might have been a misdescription, William Gray might have been a non-existent person, but whatever was the effect of the deed was so from the moment of its execution by the conveying parties, and it could not have been altered from that time forward. There may be difficulty—in fact, there is difficulty—in finding out in whom the legal estate is vested. There is difficulty in ascertaining who are bound to convey when the mortgagor insists upon his equity of redemption. There is difficulty in saying who are entitled as the parties of the third part to sue upon the covenant. But the difficulty is not caused by the alteration except to this extent, that it is necessary to find out who the parties were. I have to inquire who was William Gray. Of course, however easy it may be, you always have to inquire when you take up the deed to whom the property is conveyed. If you do not find a man properly

KEKEWICH J. 1902 HOWGATE AND OSBORN'S CONTRACT, *In re.*

described, or if you find an inconsistency, you have to inquire into it, and that is a question which can be solved by evidence. Now, one of two things seems to me to have happened. Either William Gray was non-existent or it was misdescription. I have no doubt myself that it was misdescription; and if it was misdescription there is no reason why you should not prove by parol evidence that the person described as William Gray was really Edward Thomas Gray; it is only the name, and it seems to me that the statutory declarations cleared that up completely. If that is the right view, the deed has always been a conveyance to the two persons and Edward Thomas Gray. Somebody has made a physical alteration in the parchment; but the deed stands as it was at the moment of execution. In one sense there is an alteration; in another sense there is none. It seems to me that the vendor has sufficiently made out his right, assuming that he claims properly through these two persons and Edward Thomas Gray, and that he has a right to insist upon his title.

The second point was then argued.

P. O. Lawrence, K.C., and *R. J. Parker*, for the vendor. The date of the mortgage was before the commencement of the Married Woman's Property Act, 1882; but by s. 16 of the Trustee Act, 1893, a married woman who is a bare trustee of any freehold hereditament may convey it as if she were a feme sole. The moment the money was repaid Ann Booth became a bare trustee of the property for the mortgagor, and this is not affected by the fact that the mortgage was held on trust, since she was not a trustee of the land, but only of the money secured: see Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. p. 225.

H. Greenwood, for the purchaser. The sole question is whether the addition to the relationship of mortgagee of the relationship of trustee brings the case within *In re Harkness and Allsopp's Contract* (1), and distinguishes it from *In re Brooke and Fremlin's Contract.* (2) Notwithstanding that this

(1) [1896] 2 Ch. 358. (2) [1898] 1 Ch. 647.

mortgage was held upon trust, I do not see my way to contend that this lady was not a bare trustee of the property for the mortgagor after the money was paid.

KEKEWICH J. There will be a declaration on that point also. The proper form of order is, not that a good title has been shewn according to the contract, but that the requisitions have been satisfactorily answered.

Solicitors: *Few & Co., for Carr & Coverdale, Leeds; Hamlin, Grammer & Hamlin, for H. R. Cousins, Leeds.*

H. B. H.

In re CHISHOLM. GODDARD *v.* BRODIE.

[1901 C. 3781.]

Practice—Costs—Power of Appointment—Successive Appointments of Specific Sums—Appointment of Residue—Costs of administering Trust Fund.

A husband and wife, in exercise of a joint power of appointment over a trust fund (subject to their respective life estates therein) amongst the children of the marriage, appointed three sums of 10,000*l.* in trust for their three elder daughters, and appointed the residue, after satisfying the three previous appointments, in trust for their fourth daughter, but so that the appointment should not exceed 10,000*l.* The fund was not sufficient to provide for the appointment of the full sum of 10,000*l.* to the fourth daughter. Upon the distribution of the fund:—

Held, applying the rule laid down by Chitty L.J. in *In re Saunders*, [1898] 1 Ch. 17, 23, that the general costs of administering the trust fund, including the costs of raising the estate duty payable on the respective deaths of the husband and wife and the costs of raising the appointed sums, ought to be borne rateably by the four appointed sums.

BY a settlement dated April 9, 1851, made on the marriage of James Chisholm Gooden Chisholm, hereinafter called the testator, (then James Chisholm Gooden), with Anne Elizabeth Lambert, certain funds were brought into settlement both by the testator and by his wife, the testator taking the first life interest in the funds settled by him, and the wife taking the first life interest in the funds settled by her, with a second life

KEKEWICH J. 1902 CHISHOLM, *In re.* GODDARD *v.* BRODIE.

interest in each case to the other of them, and subject to these successive life interests a joint power of appointment was given to them over the whole of the capital among the children of the marriage.

Among the children of the marriage were four daughters, Katherine, Annie, Henrietta, and Hannah.

In 1871 Katherine married F. J. L. Blackwood, and, by a deed-poll dated April 18, 1871, the testator and his wife, in exercise of the powers of their marriage settlement, jointly appointed that the trustees of the settlement should from and after the decease of the survivor of the testator and his wife stand possessed of 10,000*l.* sterling, part of and to be by the same trustees raised out of the trust funds of the settlement in trust for their daughter Katherine, to be vested in her immediately upon the solemnization of the intended marriage, and to be paid to her as soon as conveniently might be after the death of the survivor of the testator and his wife.

No settlement was made upon this marriage, but in 1879 Katherine Blackwood married H. V. Corrie, and the 10,000*l.* appointed in trust for her was assigned to the trustees of the settlement of that marriage. Corrie was now dead and there was no issue of the marriage, and in the events which happened Katherine Corrie became solely entitled to the 10,000*l.*, which was reassigned to her by the trustees of the last-mentioned settlement.

In 1877 Annie married A. Trinder, and by a deed-poll dated September 5, 1877, the testator and his wife appointed 10,000*l.* in trust for her in the same form as the appointment made in trust for Katherine, and this sum was assigned by her to the trustees of her marriage settlement.

In 1886 Henrietta married R. M. Middleton, and by a deed-poll dated October 5, 1886, the testator and his wife made a precisely similar appointment of 10,000*l.* in her favour, and this sum was assigned by her to the trustees of her marriage settlement.

In 1891 Hannah married S. Baker, and by a deed-poll dated November 21, 1891, the testator and his wife, under the powers of their marriage settlement, appointed that the trustees thereof

should from and after the death of the survivor of the testator and his wife stand possessed of the trust funds comprised in the settlement which should "remain after satisfying" the three previous appointments in trust for their daughter Hannah, provided that not more than 10,000*l.*, or trust funds and property amounting in value to that sum, was in any event intended to be thereby appointed, and that, if the trust funds exceeded that amount, the residue, after satisfying the said three previous appointments and raising and paying such sum of 10,000*l.*, or trust funds and property equivalent thereto, should remain unaffected by the deed now in statement. The appointed fund was assigned by Hannah to the trustees of her marriage settlement, and by the same settlement the testator covenanted with the trustees thereof, and also as a separate covenant with Hannah, that, if at the death of the survivor of the testator and his wife Hannah's share of the trust funds should not amount in value in the whole to the sum of 10,000*l.*, his executors and administrators would as soon as conveniently might be pay to the trustees of her marriage settlement a sum sufficient to make up the deficiency.

Baker died in 1893, and there was no issue of the marriage. In 1899 Hannah married F. F. Goddard, but no settlement was made upon that marriage.

The testator died on December 31, 1899, and his wife died on September 24, 1901.

The funds comprised in their marriage settlement amounted approximately to 38,800*l.*, of which approximately 10,800*l.* was brought into settlement by the testator, and 28,000*l.* by his wife.

The estate duty in respect of these sums payable on the respective deaths of the testator and his wife had been raised and paid by the trustees out of the trust funds comprised in the settlement.

This was an originating summons taken out by Mrs. Goddard and the trustees of the Baker settlement against the trustees of the testator's settlement, Mrs. Corrie, the trustees of the Trinder settlement, the trustees of the Middleton settlement, and the executors of the testator, to determine (1.) whether, in

KEKEWICH J.
1902
CHISHOLM, *In re.* GODDARD *v.* BRODIE.

the distribution of the trust funds comprised in the testator's settlement, the three first appointed sums of 10,000*l.* ought to bear any and what proportion of (*a*) the estate duties payable on the deaths of the testator and his wife respectively; (*b*) the costs of raising those duties; (*c*) the costs of raising the said three sums of 10,000*l.*; (*d*) the general costs of and expenses of winding up the trusts of the testator's settlement. (2.) How the value of the share of Mrs. Goddard in the trust funds under the appointment of November 21, 1891, was to be arrived at for the purpose of ascertaining the amount payable by the executors of the testator under his covenant contained in the Baker settlement.

At the hearing it was conceded that the question as to the incidence of the estate duties was covered by *In re Countess of Orford* (1) and *In re Maryon-Wilson* (2), and that the duties were payable out of all the appointed funds rateably.

Warrington, K.C. (*Ashworth James* with him), for the plaintiffs, after the question as to the duties had been decided, suggested that the costs should come out of the residuary trust funds.

P. O. Lawrence, K.C., and *Dunham*, for the executors. In the case of appointments, in contradistinction to legacies, the general rule is that the expenses of administration are borne rateably by all the appointed funds: *In re Saunders*, per Chitty L.J. (3); *In re Countess of Orford.* (1) The rule, of course, does not apply where any of the appointed funds are given "net" or "clear of deductions": *In re Currie* (4); but in that case Kay J. thought that the rule would have applied but for those words, and there is no such language used here. Therefore, each fund must bear its proportion of the costs. The distinction between wills and appointments has always been recognised.

Renshaw, K.C., and *Hatfield Green*, for the persons entitled to the three first appointed funds. There is a distinction between the costs of administration and the costs of raising

(1) [1896] 1 Ch. 257.
(2) [1900] 1 Ch. 565.
(3) [1898] 1 Ch. 17, 23.
(4) (1888) 36 W. R. 752.

the funds. The same principle applies here as in the case of raising portions, and there the costs come, not out of the portions, but out of the estate. There you are entitled to raise, for example, 10,000*l.* plus the costs of raising that amount. The costs of finding the money for the appointment are never thrown on the appointed fund.

[They cited *Trollope* v. *Routledge* (1); *Moore* v. *Dixon* (2); *In re Shaw.* (3)]

Warrington, K.C., and *Ashworth James*, for the plaintiffs. The plaintiffs have elected to support the foregoing argument, since by doing so the contribution payable out of the testator's estate will be increased. We submit that the costs of raising the duty and the costs of raising the appointed funds, as well as the general costs and charges of the trustees in administering the trust fund, ought to be borne by the residue of that fund, to use the language of the last appointment, "after satisfying" the three previous appointments. These words "after satisfying" negative the idea that any part of the costs was to be thrown on the three first appointed funds.

[KEKEWICH J. The estate duty is to be borne rateably by the appointed funds: then why not the costs of raising it?]

Because those costs are part of the ordinary expenses incurred by the trustees. The estate duty is payable rateably by virtue of the specific provisions of the Finance Act.

The cases cited deal really with costs under the control of the Court, and they lay down no rule applicable to this case. Chitty L.J. no doubt goes further, but that was a mere dictum not necessary to the decision of the case.

To hold that all the costs and expenses of the trustees from the commencement of the trust are to be borne rateably by the appointed funds will lead to great inconvenience, since the trustees will be unable to obtain payment until the date of distribution; for until that date they cannot tell out of what fund they are to be paid.

Lindley, for the trustees of the testator's marriage settlement.

P. O. Lawrence, K.C., in reply.

(1) (1847) 1 De G. & Sm. 662. (2) (1880) 15 Ch. D. 566.
(3) [1895] 1 Ch. 343.

KEKEWICH J.
1902
CHISHOLM, *In re.*
GODDARD *v.* BRODIE.

KEKEWICH J. It is singular that this point should have been fully argued as open for decision, it being, I think, concluded by authority. The point arises in this way. The testator and his wife, in pursuance of an ordinary power of appointment amongst the children of the marriage, directed on three several occasions that the trustees should stand possessed of 10,000*l.* (I am not quoting the exact language) to be raised if necessary out of the funds in their hands in trust for three of their daughters. Then a fourth daughter was about to be married, and it was not certain whether the trust funds would be sufficient to provide for the appointment of 10,000*l.* to that daughter, as the donees of the power desired, and, therefore (again not quoting the exact language), they directed the trustees to stand possessed of the remaining funds, after satisfying the three previous appointments, in trust for that daughter, indicating that they intended her to have 10,000*l.*, because there is a proviso that she is not to have more. Equality, of course, was intended. It is perfectly clear on principle and on authority that if the donees had expressed their intention that either of the sums of 10,000*l.* should be raised "without any deduction" or "clear," which was the word used in *In re Currie* (1), then, as Kay J. said and as Chitty L.J. agreed, in *In re Saunders* (2), a clear 10,000*l.* must have been raised in accordance with the express language of the deed, and the question I am now considering could never have arisen. Here they have said nothing of the kind. The only indication that they have given at all which can be relied on in argument on the question whether these sums are to be raised clear or not, is that in the ultimate deed they appointed the funds remaining after satisfying the previous appointments. The last appointee can only get what is left after these previous appointments have been satisfied. That does not in the least assist me to determine what will be satisfaction, and the deeds themselves are silent as to that. They only say that the trustees are to hold 10,000*l.* in their hands, or to be raised in trust for the particular appointee. The time for distribution has arrived, and the question is how the costs of the trustees

(1) 36 W. R. 752. (2) [1898] 1 Ch. 17, 23.

are to be borne. There is no inconvenience in postponing that question until the period of distribution. The trustees can from time to time help themselves to pay costs out of pocket and the costs which are chargeable against them by their solicitors out of the entirety of the trust funds, or out of any convenient fund that may be available, without prejudice to the question on whom the burden is ultimately to fall. That arises on the distribution of the fund, and has now to be considered. It may be necessary to raise, we will say, the first 10,000*l.* If so, the trustees will incur some expense with reference to that particular fund. For instance, there might be 10,000*l.* on mortgage, and the trustees might think it necessary to call it in. That might give some trouble; there might be a transfer of the mortgage, some costs might not be paid by the mortgagor, and there might be expenses incurred in that way. There is a certain amount of distinction between costs of that kind, which might be looked upon as costs of raising the particular 10,000*l.* and the general costs of the trustees; but I do not think that there is any distinction in substance. If they are costs which generally ought to be paid out of the fund rateably, then I do not think there is any distinction as regards those costs. They are costs incurred, no doubt, in reference to one particular appointment, they are costs incurred in reference to the fund the subject of that appointment of 10,000*l.*, but they are costs incurred with reference to the whole fund in severing that particular 10,000*l.* that has to be severed from the rest, and I cannot myself see that any of those costs can be distinguished from the general costs of administering the fund.

Now, how am I to deal with the general costs of administering the fund? There have been several cases cited. I will first mention *Trollope* v. *Routledge* (1), before Knight-Bruce V.-C. There several points had been argued respecting the appointments, and, when they were all settled, counsel for an incumbrancer of one of the shares contended that, as there was a fair question occasioned by the language of the deeds, the costs ought to come out of the unappointed part of the fund by

(1) 1 De G. & Sm. 662, 671.

KEKEWICH J.

1902

CHISHOLM, *In re.* GODDARD *v.* BRODIE.

analogy to the case of a will, where the costs arising from difficulties of construction fall upon the residuary estate. That was the sole point raised. "The Vice-Chancellor said, that, as he believed, the rule had not been applied to appointments, and directed the costs to be apportioned according to the amounts of the appointed and unappointed parts of the fund, and to be borne by those parts respectively, according to their amounts." He simply did not apply the rule in the administration of estates which he was asked to apply, and he thought that the costs ought to be borne differently, he being perfectly free to give that direction if he thought fit. The Vice-Chancellor considered that that was an equitable way of distributing the costs; but, unless instructed as presently stated, I should not have thought that he intended to lay down any rule.

That he did so intend is concluded by some other cases. The first of these is *Moore* v. *Dixon* (1), a decision of Malins V.-C. There there was a usual power of appointment and exercise in favour of children unequally; but the hotchpot clause came in, and so there was not very much difference in the result. Then there was an action to administer the trusts of the settlement, and the Vice-Chancellor was asked to determine, and he gave some care to the determination of the question how those costs were to be borne; and he decided that they were to be borne rateably by all the funds. He not only decides it, but he treats himself as deciding it on authority, including the case of *Trollope* v. *Routledge*. (2) In reference to that case he says: "That is, therefore, a clear decision on the subject, and it seems to have been followed ever since, and to have become an established rule." He therefore regarded it as a settled rule of the Court. Then the matter came before North J. in *In re Shaw*. (3) There there were successive appointments of a specific amount, and then the residue was appointed by will. Questions arose there as to the account duty, and as to the costs of administering the fund. There, again, he did not decide it as a question in his discretion

(1) 15 Ch. D. 566, 570. (2) 1 De G. & Sm. 662, 671.
(3) [1895] 1 Ch. 343, 347.

at all. *Trollope* v. *Routledge* (1) was cited to him, and although it is not in terms referred to in his judgment, he says at the end: "But I am very glad to find that there is authority that the costs should be borne rateably." He therefore seems to have agreed with Malins V.-C. that that was an authority on the point; and, notwithstanding what occurs to me on looking at the case of *Trollope* v. *Routledge* (1), when I find two learned judges saying that it is an authority, I think it must be regarded as such; and if it were not an authority at the moment, it was made so by their adoption. The same learned judge decided the same point in the same way in *In re Countess of Orford.* (2) No reasons are given in that report, but in 73 L. T. 681 there is again a reference to an established rule, and he mentions several cases, including *Petre* v. *Petre* (3), which had been cited as an adverse decision, and says that it would not justify him in departing from the modern rule. Then in the case of *In re Saunders* (4) Chitty L.J. states the general rule in perfectly clear terms: "In the case of an appointment, if there are no words to the contrary"—he is distinguishing appointment from legacy—"all the appointees have, according to the general rule, to bear rateably the expenses of the trustees in relation to the administration of the fund, including its distribution." Though it was not necessary perhaps for his decision, there is a clear enunciation of the rule by a Lord Justice of very great experience both at the bar and as a judge of first instance in administration cases, and it seems to me to have exceptionally high authority. He says that all the costs of administering the fund, including the distribution, are to fall upon the appointees rateably. After that there can be no room for doubt.

Now, what are the costs of administering the fund? I have already said that I do not see that the costs of raising any particular fund can he distinguished from the other costs of the trustees. I will not say there may not be some distinction in a particular case, but generally I think it must be taken that all the costs properly incurred by the trustees are costs of

(1) 1 De G. & Sm. 662.
(2) [1896] 1 Ch. 257.
(3) (1851) 14 Beav. 197.
(4) [1898] 1 Ch. 17, 23.

KEKEWICH J.

1902

CHISHOLM, *In re.* GODDARD *v* BRODIE.

administering the fund. It is for that reason that they are entitled to have them. Then why not the costs of raising a sufficient amount to pay the duty? The trustees do not raise the duties in a case of this kind as the appointments are made, but they raise them when required by the Government—when the time comes for distribution. They raise them out of the whole of the fund—that is to say, any part of it that happens to be convenient for the purpose. Those are costs incurred by them in the discharge of their duty as administrators of the fund. I think that the rule is this, and it must be taken to be quite settled (I am not dealing with the costs of this application) that all the costs must be borne by the appointed funds rateably.

Upon the second question the learned judge held that the deficiency to be supplied by the testator's estate was the sum required to make up the gross amount of the appointments to 40,000*l.*, and he held further that the estate duty on so much of the testator's estate as was required to make up that deficiency was to be borne by that estate, it being conceded that this point was covered by *In re Gray*. (1) With regard to the costs of the application, he directed that the costs of all parties, other than the costs of the executors, as to which he made no order, should be paid out of the funds of the testator's settlement.

Solicitors: *Janson, Cobb, Pearson & Co.; Trinder, Capron & Co.; Simpson & Bowen.*

(1) [1896] 1 Ch. 620.

H. B. H.

In re W. KEY & SON, LIMITED.

BYRNE J.

1902

Jan. 16, 22.

Company—Shares—Bankruptcy of Member—Claim to Lien under Articles for Bankrupt's Liabilities to Company—Trustee's Right to Registration and Share Certificate not referring to Claim—Rectification of Register—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 25, 30, 35; *Sched. I., Table A, clauses* 2, 13.

Where a shareholder of a company becomes bankrupt and the transmission clause in its articles of association is in the form of clause 13 of Table A in the 1st schedule to the Companies Act, 1862, the trustee is entitled to be registered in respect of and to have a certificate of the shares, and the company has no right to enter in the register of members or in his certificate any statement as to the company's claim under its articles to a lien on the shares for the liabilities of the bankrupt to the company.

The right of the trustee to clean registration may be enforced by motion for rectification of the register under s. 35 of the Act of 1862.

W. KEY & SON, LIMITED, was incorporated in 1900, one of its objects, as stated in its memorandum of association, being to acquire and carry on a business then carried on by Thomas Henry Norris, and to enter into and carry into effect an agreement with him as to the purchase of the business. The purchase price under this agreement was to be paid and satisfied as to 10,000*l.* by the allotment to Norris or his nominees of 10,000 fully paid ordinary shares of 1*l.* each in the company.

The articles of association of the company, so far as material, were as follows:—

"1. Subject as hereinafter provided the regulations contained in the Table marked A in the 1st schedule to the Companies Act, 1862 (hereinafter called Table A), shall apply to this company."

Art. 2 provided that the company should forthwith enter into the agreement with Norris, and carry the same into effect.

Art. 3 provided that certain clauses of Table A—including clause 10, but not clause 2 or clause 13—should not apply to the company.

"5. The directors may decline to register any transfer of shares upon which the company has a lien . . . ."

BYRNE J.
1902
W. KEY & SON, LIMITED, *In re.*

"7. The company shall have a first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others) for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have arrived or not, and such lien shall extend to all dividends from time to time declared in respect of such shares."

Arts. 8 and 9 provided that the shares subject to the lien might be sold for the purpose of enforcing it, and that the proceeds should be applied in satisfaction of the debts, liabilities, and engagements, and the residue, if any, paid to the member, his executors, administrators, or assigns.

Clause 2 of Table A provides that "Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate, under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon."

The excluded clause 10 of Table A, for which art. 5 was substituted, provides that "The company may decline to register any transfer of shares made by a member who is indebted to them."

Clause 13 of Table A provides that "Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company."

The agreement with Norris having been executed, 4000 ordinary shares were allotted to him, and he received a certificate under the seal of the company, dated August 23, 1900, certifying that he was "the registered proprietor of 4000 fully paid ordinary shares of 1*l.* each, numbered 1 to 4000 inclusive, in W. Key & Son, Limited, subject to the memorandum and articles of association and the rules and regulations of the said company."

A receiving order in bankruptcy was made against Norris in December, 1900, under which he was afterwards adjudicated a

bankrupt, and A. E. Preston was appointed his trustee in bankruptcy.

In April, 1901, Preston claimed to be registered as holder of the 10,000 shares under the agreement, and the company's solicitors wrote a letter to the effect that the company was prepared to register him in respect of the 4000 shares.

In July, 1901, the company commenced an action against Preston to enforce an alleged lien of the company under its articles on the 10,000 shares in respect of an alleged liability of Norris to the company.

Notwithstanding the action, further correspondence passed between the solicitors to the parties in which Preston's solicitors asked that their client might be registered in respect of the 4000 shares, and threatened to move for the rectification of the register if this was not done, and the company's solicitors stated that its directors had resolved to register Preston as trustee of the bankrupt, but proposed to indorse on the certificate of shares to be issued a memorandum stating that the shares were subject to the company's lien under their articles; but Preston's solicitors objected that the company had no right to make any indorsement on the certificate.

On December 3, 1901, a certificate was sealed by the company certifying that Preston, "trustee of the property of Thomas Henry Norris, a bankrupt," was the registered holder of the 4000 shares "subject to the memorandum and articles of association" of the company, and that upon each of the shares the full amount of 1*l.* had been paid up. At the foot of the certificate there was the following memorandum: "Note.—No transfer of any portion of the shares comprised in this certificate will be registered until the certificate has been delivered at the company's office. The shares comprised in this certificate are a portion of 10,000 shares, numbered 1 to 10,000 inclusive, on all of which the company claim a lien under the company's articles of association for the debts, liabilities, and engagements of the said Thomas Henry Norris to the company."

On December 17 the company's solicitors tendered the certificate to Preston's solicitors, but they declined to accept it, and on January 1, 1902, served a notice of motion on the company for rectification of the register of members by

BYRNE J. 1902 W. KEY & SON, LIMITED, *In re.*

substituting therein the name of Preston for that of Norris as the holder of the 4000 shares.

After the notice of motion had been served, Preston was entered as the holder of the shares in the register of members, in which, against his name, the following memorandum was entered: "These shares are a portion of 10,000 shares, numbered 1 to 10,000 inclusive, on all of which the company claim a lien under the company's articles of association for the debts, liabilities, and engagements of Thomas Henry Norris to the company."

On January 2, 1902, Preston delivered his defence in the action, in which he denied that the company was entitled to any lien or charge upon the shares.

The motion was heard by Byrne J. on January 16, 1902.

Levett, K.C., and *Frank Evans*, in support of the motion. The applicant is entitled to be entered on the register of members in the ordinary way in respect of the 4000 shares, and to have the usual certificate in each case without there being any memorandum on the certificate as to the claim of the company to a lien. Whether the company has or has not a lien is not a question which is to be or could be decided on the present application, but it is a question for decision in the action now pending.

Art. 5 of the company's special articles empowers the directors to decline to register a transfer of shares on which the company has a lien and the company claims a lien under art. 7; but transfer is a different thing from transmission. There is no special transmission clause in the articles, and clause 13 of Table A applies where a person becomes entitled to a share in the company in consequence of the bankruptcy of a member. Where that clause applies, although the company has a lien, the trustee in bankruptcy, on an application for rectification of the register of members under s. 35 of the Companies Act, 1862, is entitled to an order substituting his name for that of the bankrupt: *In re Bentham Mills Spinning Co.* (1)

When the trustee's name is put on the register, the company

(1) (1879) 11 Ch. D. 900.

has no right to put any memorandum on the register throwing doubt on his title to the shares. Sect. 25 of the Act of 1862 states what the company is to enter in the register, namely, the name, address, and occupation of the member, the shares held by him, the denoting number of the shares, the amount paid or agreed to be considered as paid on the shares, and the dates when the holder became and ceased to be a member; and the section imposes a penalty for acting in contravention of its provisions. Then s. 30 says that no notice of any trust, expressed, implied, or constructive, is to be entered on the register. The statute contemplates that the register shall shew the legal title only of the member with the particulars of his holding.

As to the certificate of shares, clause 2 of Table A, which forms part of this company's regulations, says that a member, on payment of a fee, shall "be entitled to a certificate under the seal of the company specifying" certain things, namely, "the share or shares held by him, and the amount paid up thereon." There is nothing in that or any other regulation of the company authorizing it to indorse the certificate with notice of the company's claim to a lien. The applicant is entitled to a clean registration and to a clean certificate of shares.

R. F. Norton, K.C., and *M. Muir Mackenzie*, for the company. The applicant's name has been placed on the register, and the memoranda on the register and certificate are put on for the protection of the company. The omission of the memoranda can only be wanted for the purposes of fraud. Bacon V.-C. held that a trustee in liquidation of a shareholder who had transferred his shares by way of mortgage, but whose transfer had been refused registration because the transferor was indebted to the company, was entitled to be registered under a clause similar to clause 13 of Table A, subject as to the shares to all the equities subsisting therein: *Ex parte Harrison.* (1) But on appeal (2) this decision was reversed, and it was held that, although the mortgagees consented (without waiving their security) to the trustee being registered, the

(1) (1884) 26 Ch. D. 522. (2) (1885) 28 Ch. D. 363.

BYRNE J. 1902 W. KEY & SON, LIMITED, *In re.*

transfer was not void, and that the trustee was not entitled to be registered.

The company, if it gave the applicant what is called a "clean certificate," might, if he transferred the shares to another person, be estopped from setting up its lien: *Burkinshaw* v. *Nicolls*. (1)

[*Levett, K.C.*, referred to the statement in the certificate that the shares were "subject to the memorandum and articles."]

Norris having become indebted to the company, the lien of the company does affect the shares in the hands of the trustee, and placing a record on the register is not entering notice of a trust: *Bradford Banking Co.* v. *Briggs*. (2) It is the duty of the company to record the lien in some way. If it were not recorded it might be forgotten by the existing officers of the company, or new officers might be appointed who had no knowledge of its existence. The register of members is the proper place in which to record the lien.

Apart from estoppel, the entry and certificate without the memoranda cannot help the applicant, for as a trustee in bankruptcy he can only take the interest in the shares which the bankrupt had. In well-drawn articles the transmission clause is different from clause 13 of Table A; but the special art. 5 does not follow the terms of clause 10 of Table A, which is excluded. If, therefore, the applicant executes a transfer, the company may decline to register it on the ground that the company has a lien on the shares.

Levett, K.C., in reply.

Cur. adv. vult.

Jan. 22. BYRNE J. This is a motion on behalf of Arthur Edwin Preston, the trustee in bankruptcy of one Thomas Henry Norris, asking that the register of members of the company, W. Key & Son, Limited, may be rectified by entering thereon the name of Preston as a member of the company in respect of 4000 ordinary shares of that company, numbered 1 to 4000 inclusive, in the place of Norris, in whose name the

(1) (1878) 3 App. Cas. 1004. (2) (1886) 12 App. Cas. 29.

shares are or were standing, and that the company may be ordered to pay to Preston his costs of the application. The position of matters is that the company do not decline to register Preston, but they claim the right to enter upon the register in respect of the 4000 shares a memorandum, similar to a memorandum which they propose to insert in the new share certificate to be granted to Preston. [His Lordship read the memorandum on the register, and continued:—] The certificate they propose to give is in the ordinary form. It certifies that Preston is the registered holder of the shares in question "in the above-named company subject to the memorandum and articles of association thereof, and that upon each of the said shares the full amount of 1*l.* has been paid up." Then follows a memorandum that "no transfer of any portion of the shares comprised in this certificate will be registered until the certificate has been delivered at the company's office. The shares comprised in this certificate are a portion of 10,000 shares, numbered 1 to 10,000 inclusive, on all of which the company claim a lien under the company's articles of association for the debts, liabilities, and engagements of the said Thomas Henry Norris to the company."

The application is made with reference to the register of members; but, if the company were entitled to enter the applicant's name in the register with the memorandum referring to the claim to a lien, I do not think it would be disputed that the certificate ought to be in accordance with the register, so that the form of certificate is involved in the question as to what is to be put on the register; and a good deal of argument has been addressed to me with reference to what the effect of giving a certificate in the proposed form would be. Norris was the holder of 10,000 shares in the company, but there is only a question with reference to 4000 of these shares. The company is governed by articles of association which provide as follows: [His Lordship read arts. 1, 3, 5, 7, 8, and 9, and continued:—]

There is no special article with reference to the transmission of interest as distinguished from transfer, so all that is thrown upon Table A, clause 13 of which is applicable. Norris was registered and held a certificate in respect of these 4000 shares

BYRNE J.
1902
W. KEY & SON, LIMITED, *In re.*

in the usual and ordinary form—that is to say, that they were held as "fully paid ordinary shares of 1*l.* each," "subject to the memorandum and articles of association and the rules and regulations of the said company." The applicant, who is his trustee in bankruptcy, now comes and says, "There has been a transmission of interest, and by virtue of that transmission I am now entitled to be registered as a member. I produce the ordinary evidence; here is the certificate"; and with the company, so far as that is concerned, there is no difficulty in any way. The applicant's counsel has with reference to the entries to be made on the register referred to ss. 25 and 30 of the Companies Act, 1862. [His Lordship read the sections, and continued:—]

The right to a certificate depends on clause 2 of Table A [which his Lordship read]. I think that, primâ facie, the right of a person taking by transmission is to be entered upon the register in the same way as his predecessor in title was entered, and to have the certificate in the same form as that of his predecessor in title. The question is whether the company are entitled to say, "We will put upon the register a memorandum to the effect that we now claim a sum as being due under the clause in the articles giving us a lien." At present the company claim that a lien has accrued in respect of certain moneys, and they have brought an action for the purpose of establishing and enforcing that lien. The claim to a lien is altogether denied, and the action is being resisted. The company now say, "We are entitled to put on this register a notice that we have this specific claim," and it was contended that the company might put anything on the register which was not in terms forbidden by the Act and which was not wrongfully mischievous to the shareholder, and which was put on by them in good faith. But if they are entitled to put on the special memorandum which they propose to put on, I do not see how the right of the company to give the certificate in the form they propose to give it can be resisted, because the certificate ought to correspond with the register as shewing what the interest recognised by the company is. Primâ facie, the applicant is entitled to a "clean" certificate, like that possessed

by the person from whom he derives his title. Why should the company be entitled to put such a memorandum as I have mentioned on the register at all? It was argued that there might be new directors of the company or a new secretary, and they might forget that there was an accrued right, or a claim to an accrued right, to a lien. Well, I confess that that argument does not appeal to me. The same argument applied during the time that the bankrupt was upon the register. The new directors, or the new secretary, might have been so foolish as to forget they had a claim, but I do not think that would have justified any alteration in the register making it inconsistent with the certificate that they had given to him; and it does not seem to me that it is necessary for the protection of the company in any way that they should enter the memorandum upon the register.

But it was said that it is essential to grant the certificate in this special form for the protection of the company. Counsel for the company have failed to shew me that that is necessary. The company claim to have a lien, and are entitled to that lien, if at all, by virtue of the articles, and the certificate is only granted in form "subject to the memorandum and articles of association." The only ground which could be suggested as a reason for the certificate being granted in the form proposed is that, there now being a claim to a specific lien, the company might be held estopped hereafter if they granted a certificate without mentioning on it that there was such a claim, and that the lien under the articles had now ripened into an immediate charge for a sum of money—it does not say what sum. I should be sorry to say anything to suggest that the company would be estopped. They have power under their articles to decline to register any transfer of shares upon which the company has a lien, and it appears to me that the note on the certificate is not necessary for the protection of the company, and that it would be detrimental to the trustee in bankruptcy, who is now asking for registration. Why should he be put in a worse position than the bankrupt was in reference to this matter? The certificate is evidence of the legal title; the trustee is entitled to be put on as the legal owner of these

BYRNE J. 1902 W. KEY & SON, LIMITED, *In re.*

shares, and it seems to me he is entitled to what was called in the evidence and in the course of the argument a "clean certificate."

If there were any probability or prospect of a fraudulent or wrongful dealing on the part of the applicant with the shares, so soon as he came into possession of the certificate, the true remedy of the company would be, as it seems to me, to apply for an injunction in the pending action to restrain him from dealing in any way with the certificate, but I do not think they have any right at all to put in such a statement as they propose, which might lead to serious inconvenience. Suppose the action goes on, and it turns out that there is no lien on these shares at all, why is this gentleman to have a certificate in his hands saying that his shares are subject to the claim of the company? Suppose he wanted to deal with the certificate; he might be absolutely free from the claim and yet would only have a certificate stating that the shares were subject to it. But then it is said that he could apply for a new certificate. Supposing he applies for a new one and the company say, "We will not give you a new one; you are only entitled if your old certificate is worn out or lost." There might be very considerable difficulty, and he might have to take proceedings to get an amendment of the certificate in some way or to obtain a new one. It seems to me that the company have no right to do as they propose—namely, to put a memorandum on the certificate granted holding out that the shares referred to in it are subject to some special right which interferes with the legal title; for that is really what the meaning of it would appear to be. I think the register ought to be rectified as proposed—that is, by striking out any reference to the specific claim on the register. That is all I have to do now, but I intimate that it seems to me that the form of the certificate must follow the form of the register. The respondents must pay the costs.

Solicitors for applicant: *Ward, Perks & McKay.*

Solicitor for company: *W. H. Court, for Albin Hunt & Fourmy, Chesham.*

F. E.

PEPPERELL *v.* HIRD.

BYRNE J.

1902

Jan. 24, 25.

[1901 P. 1407.]

Practice—Summons for Directions—Notice of Application to Master—Interlocutory Matter—Order in Chambers dismissing Action—Jurisdiction—Rules of Supreme Court, Order XXX., *rr.* 1, 2, 4, 5.

Where a summons for directions has been issued under Order XXX., r. 1, there is jurisdiction, upon an application by a defendant in chambers for further directions on notice under rule 5, to strike out a statement of claim on the ground that it discloses no reasonable cause of action, and to dismiss the action with costs as frivolous and vexatious. An application of this nature is an interlocutory matter within rule 5, which is not controlled or limited by rule 2 to the matters therein particularly enumerated.

MOTION.

This was an application by the plaintiff to discharge an order made in chambers dismissing his action, which raised the question of the jurisdiction of the Court to make an order of this kind upon the application of a defendant, on notice under rule 5 of Order XXX., for subsequent directions under the summons for directions. The facts, so far as material, were as follows:—

On June 19, 1901, the writ in this action was issued against the defendant Hird, as the surviving trustee of a marriage settlement of August, 1859, under which the plaintiff alleged he was tenant for life, and three other defendants, who were alleged to have wrongfully possessed themselves of, or intermeddled with, the trust funds of that settlement.

On July 5 the usual summons for directions under Order XXX., r. 1, was taken out by the plaintiff for directions as to pleadings, place and mode of trial.

On July 24 a statement of claim was delivered containing twenty paragraphs, in which the plaintiff claimed, amongst other things, payment of arrears of income, replacement of the trust funds, to have various deeds set aside as fraudulent, administration of the trusts of the settlement, appointment of new trustees, damages, and an injunction restraining the

BYRNE J. 1902 PEPPERELL v. HIRD.

defendants from continuing the acts complained of, and a declaration as to the plaintiff's rights.

A previous originating summons against the defendant Hird claiming very much the same relief having been dismissed with costs in July, 1900, on October 28, 1901, an order was made in chambers on the application of the defendant Hird, on notice under rule 5 of Order xxx., under the pending summons for directions staying all further proceedings in the present action as against the defendant Hird until the taxed costs of the originating summons had been paid by the plaintiff, and the time for delivering a defence was also extended until seven days after the payment of these costs.

On December 5 an order was made in chambers on the application of another defendant, Evans, upon a similar notice under rule 5, dismissing the plaintiff's action with costs, on the ground that the statement of claim disclosed no reasonable cause of action and was frivolous, unless within fourteen days an amended claim was delivered. Similar orders were also made in favour of the other two defendants, upon a similar application, though for the purposes of this report the orders in favour of the defendant Evans are the only ones necessary to be referred to.

On December 19 an amended statement of claim was delivered.

In January, 1902, the defendant Evans again served the plaintiff with notice, under rule 5, of an application for further directions. This notice, which was in the same form as the previous notices, was as follows: "Take notice that the above-named defendant, S. Evans, intends to apply to the judge in chambers" (then came the date and time) "for further directions in this action as follows: (1.) That the amended statement of claim in this action delivered . . . . may be struck out as against the defendant Evans on the ground that it discloses no reasonable cause of action against the said defendant, and that this action may be dismissed with costs as being frivolous and vexatious."

On January 9 an order was made in chambers, on the application of the defendant Evans, dismissing the plaintiff's action,

with costs to be taxed and paid to the defendant, on the grounds stated in the above notice. Similar orders in favour of the other two defendants were also made at the same time. The plaintiff did not appear in chambers on the hearing of the application when these last-mentioned orders were made, and now moved to discharge them as irregular and unauthorized for various reasons set out in detail, and at some length, in his notice of motion, some of which are briefly dealt with in the judgment; but the only question argued which calls for any detailed report was whether the order dismissing the action had been rightly made on notice under rule 5 of Order XXX.

The plaintiff appeared in person, and contended that there was no jurisdiction to make an order of the kind on an application for further directions under the summons for directions, and also that the order was irregular on various other grounds.

E. Clayton, for the defendant Evans. Rule 5 of Order XXX. is not limited or controlled by rule 2, so as to be applicable only to the matters there specified.

[BYRNE J. I am satisfied that this is an interlocutory matter.]

In Daniell's Chancery Practice, 7th ed. at p. 311, it is laid down that "all interlocutory applications subsequent to the hearing of the summons for directions must take the form of applications for further directions by notice instead of summons as heretofore." In Form of Summons in Daniell's Chancery Forms, 5th ed. form 2008, and form 423, after referring to pleadings, discovery, place of trial, and other matters, "any other interlocutory matter" is given, shewing that the various matters mentioned in rule 2 are not the only interlocutory matters which can be dealt with under the summons for directions and subsequent applications thereunder. That there is a well-recognised practice of making orders of this kind under Order XXX. is clear from the text-books: Daniell's Chancery Practice, 7th ed. p. 314; Annual Practice, p. 374. The defendant, therefore, followed the right course in making the application by notice under rule 5, rather than by taking out another summons. That there

BYRNE J. 1902 PEPPERELL v. HIRD.

is jurisdiction to make the order seems clear from *Horton* v. *Bosson*. (1) Objection should have been taken to the jurisdiction in chambers: this was not done, and it is too late to take the objection now. This motion, therefore, ought to be dismissed.

The plaintiff replied.

BYRNE J., after stating the nature of the present application, the substance of the notice of motion, and the principal objection raised by the plaintiff to the order in chambers dismissing his action, continued:—There is no doubt at all in my mind that the Court had ample jurisdiction to make this order, and the only question is whether it was rightly made upon an application by notice under rule 5 of Order XXX. for subsequent directions under the summons for directions, rather than by means of an ordinary summons under rule 4 of Order XXX. It is a mere technicality; but if I thought there was any substance in the plaintiff's case beyond it, I might look at the matter in a different light from that in which I now regard it. The plaintiff is an undischarged bankrupt; he has prior to this action taken proceedings against one of the defendants, Hird, by means of an originating summons, with reference to some of the matters which are referred to in this action; that summons has been dismissed with costs, and an order was in October last made staying all further proceedings against the defendant Hird, quite independently of the order now in question. In the present case I have been carefully through the amended statement of claim, with the assistance of the defendant's counsel, to see if the plaintiff has any rights, or makes out any case, against the defendant Evans and the other defendants in whose favour the orders have been made dismissing the action on the ground that the amended statement of claim discloses no reasonable cause of action, and I come to the conclusion that there are no merits at all in the plaintiff's case behind this application. With reference to the plaintiff's other objections, I am of opinion that the notice under rule 5 was duly served, that the defendants were not in default or out of time for delivering pleadings when this notice was served, and I am of

(1) (1899) 80 L. T. 435.

opinion that the application was regularly made, and the matter regularly disposed of in chambers, and I come now to the only question of any substance, namely, whether the Court has jurisdiction upon an application of this kind to make the order it has made. Had the plaintiff attended before the master in chambers, I should have had no doubt at all upon this question, as then an objection of this kind might and probably would have been taken and dealt with, or the matter might have been adjourned to the judge, because an objection to jurisdiction, if it is taken at all, ought to be taken at the time the matter is heard, and it is too late to take it after the order has been made; but, as a matter of fact, the plaintiff did not think fit to attend in chambers for the reasons he has given in Court, and he now moves to discharge the order made in chambers on the ground of irregularity and want of jurisdiction.

Now, rule 2 of Order XXX. provides for interlocutory proceedings in the action before the trial, and enumerates in particular the following matters: pleadings, particulars, admissions, discovery interrogatories, inspection, commissions, examination of witnesses, place and mode of trial; and rule 5 provides that subsequent applications for any directions as to "any interlocutory matter or thing" by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application. Had there been no regular practice established under these rules, I can see very considerable difficulty in exactly making out how far rule 5 was meant to be confined to the special things mentioned in rule 2, which are clearly interlocutory proceedings. In the present case an order has been made under these rules which in the opinion of the Court of Appeal in *Horton* v. *Bosson* (1), a somewhat similar case, was held to be an interlocutory order. I do not mean to say that the particular order made in this case has been held to be interlocutory, but a similar order has been held by the Court of Appeal to be interlocutory within these rules. It also appears from the books of practice, stated in so many words, that it has been the practice in both the Chancery and King's Bench Divisions, on application under the

(1) 80 L. T. 435.

BYRNE J. 1902 PEPPERELL v. HIRD.

summons for directions, to make orders similar to the one now under consideration. It is quite true that no reported case has been produced to me in which the express point has been decided, whether on an application by a defendant under rule 5 of Order xxx., if the party served with notice does not attend, an order can be made striking out the statement of claim on the ground that it discloses no reasonable cause of action, and dismissing the action as frivolous; but I have the statement in the latest book of practice, Daniell's Chancery Practice, 7th ed. at p. 314, that "it is the practice in both Divisions to make almost any order which is not a final judgment. Thus, orders to stay proceedings, orders for accounts and inquiries, foreclosure or sale, are so made, and sometimes even orders to dismiss for want of prosecution." And in the present Annual Practice, at p. 374, I find it stated that in both Divisions "orders to stay and dismiss are made on summons for directions, and in the Chancery Division orders for account under Order xv. are so made." I have myself made orders under these rules staying all further proceedings on default of the delivery of further and better particulars, or for non-compliance with some other special directions therein given, within a fixed time, and I see no reason to doubt the statements I have referred to in the text-books.

Being of opinion that there are no merits, and no substance in the plaintiff's case beyond this application, and finding as I do that there is a well-established practice in both Divisions under which orders similar to the present have been made upon an application for further directions under the summons for directions, I hold that the present application fails, and I dismiss the motion with costs.

Solicitors: *Stanley Evans & Co.*

W. C. D.

In re FERGUSSON'S WILL.

BYRNE J.

1902

Jan. 22, 28.

[1901 F. 1580.]

Will—Construction—Next of Kin—Sister of the Half-blood—Nephews and Nieces—Domicil—Foreign Law.

A bequest of personalty in the will of a domiciled Englishman to the "next of kin" of a foreigner must be construed to mean the nearest in blood according to English law, subject to any question of status should it arise.

Accordingly, where a domiciled Englishman bequeathed a legacy to a German, with a direction that in the event of the death of the legatee in his lifetime, which happened, the legacy should not lapse, but be divided among the "next of kin" of the legatee:—

Held, that the next of kin must be ascertained according to English law, and that a sister of the half-blood was therefore entitled, to the exclusion of nephews and nieces who by German law would have had priority.

ADJOURNED SUMMONS.

This was an application for payment out of court of a sum of 392*l.* 12*s.*, which raised the question whether the next of kin of a legatee were to be ascertained by the law of Hamburg or of England.

The testator, a domiciled Englishman resident in India, who died in October, 1898 (1), bequeathed to his niece, Minnie Koppe, "of 4, Market Street, Hamburg, Germany," Government 4 per cent. promissory notes for Rs.6500; the will contained a declaration that in the event of the death of a legatee in the lifetime of the testator, the legacy was not to lapse, but should "be divided amongst the next of kin of the deceased legatee." Minnie Koppe died in June, 1897, in Hamburg, a domiciled German subject, without any issue; her nearest relations were a half-sister and nephews and nieces, the children of a deceased brother. The testator's estate proved insufficient to pay all the legacies in full, and as claims to the legacy had been made by Minnie Koppe's stepchildren, her half-sister, and her nephews and nieces, children of a

(1) The Civil Code of the German Empire had then been passed, but did not come into operation till the 1st of January, 1900.

BYRNE J.
1902
FERGUSSON'S WILL, *In re.*

deceased brother of the whole blood, the Administrator-General of Bengal, the executor of the will, remitted the amount of rupees attributable to the legacy of Minnie Koppe to his official agent in England, to be paid into court under the Trustee Act, 1893. It appeared from the opinion of a German lawyer, which had been obtained for the purpose of the present application, that, according to Hamburg law, brothers and sisters of the half-blood came after brothers and sisters of the whole blood and their children, in ascertaining the next of kin on an intestacy, and that they all had priority over stepchildren.

Borthwick, for the executor.

Jessel, for the nephews and nieces. This, being the will of an Englishman, must be governed by English law; but when the "next of kin" have to be ascertained, then, as Minnie Koppe was a German domiciled in Hamburg, they must be ascertained according to the local law; just as in a gift of personalty to the children of a foreigner, those children take who are legitimate according to the law of the country of the parent's domicil, whether born before or after marriage in countries where subsequent marriage makes the ante nati legitimate: *In re Goodman's Trusts* (1), *In re Andros* (2), and *In re Grey's Trusts*. (3) The principle of those cases applies here. In a gift to the "next of kin" or to the "children" of a named person, a foreigner, it is a question of status to be determined by the law of the country in which the named individual is domiciled. If the "next of kin" is interpreted as it ought to be as nearest in blood according to German law, then the nephews and nieces are entitled to the exclusion of the half-sister.

W. E. C. Baynes, for the assignee of a nephew, adopted this argument.

W. M. Cann, for the half-sister. This will must be construed throughout according to English law. "Next of kin" used as here, without any reference to the Statute of Distributions,

(1) (1881) 17 Ch. D. 266. (2) (1883) 24 Ch. D. 637.
(3) [1892] 3 Ch. 88.

means "nearest of kin": *Elmsley* v. *Young* (1); and in ascertaining the nearest of kin, persons related to the testator by the half-blood are equally of "kin" to him with those of the whole blood: Williams on Executors, 9th ed. p. 984. In the will of an Englishman next of kin must be interpreted according to English law: Westlake on Private International Law, 3rd ed. pp. 136, 137. It is a question of construction throughout, not a question of status, as in *In re Goodman's Trusts* (2) and *In re Andros* (3); or of civil capacity, which does not arise in this case if it is one purely of construction: Dicey's Conflict of Laws, pp. 474, 475. The proper persons to take under the description next of kin must be ascertained by the law of the place where the will is made and the testator is domiciled: Story on the Conflict of Laws, 8th ed. pp. 668–670; 4 Burge on Colonial and Foreign Laws, pp. 591, 594. [*Enohin* v. *Wylie* (4) was also referred to.] In ascertaining the next of kin, if a question of legitimacy arose I admit that then the German law might be applicable, but in other respects the next of kin must be ascertained according to English law.

Jessel, in reply. Kinship must be a question of status. Story on Conflict of Laws, 8th ed. p. 145, n., refers to *In re Goodman's Trusts* (2) as being a question mainly of capacity. [He also cited the definition of "status" from the Century Dictionary.]

BYRNE J., after shortly stating the will, continued:—The question, which has been well and carefully argued, turns upon the true meaning to be placed upon the gift to the "next of kin" of the deceased legatee Minnie Koppe, a domiciled German subject, and arises between her sister of the half-blood, and her nephews and nieces of the whole blood. It appears that the local law of Hamburg did not recognise brothers and sisters of the half-blood as being in the same degree of relationship with brothers and sisters of the whole blood, or even with the more remote nephews and nieces of the whole blood; so that by that law these nephews and nieces

(1) (1835) 2 My. & K. 780.
(2) 17 Ch. D. 266.
(3) 24 Ch. D. 637.
(4) (1862) 10 H. L. C. 1.

BYRNE J. 1902 FERGUSSON'S WILL, *In re.*

would take to the exclusion of the sister of the half-blood (1), whereas by English law the sister of the half-blood would be entitled to the exclusion of the nephews and nieces. It is common ground that this, being the will of a domiciled Englishman, must be governed by the law of England so far as construction is concerned, and I have first of all to determine what is the true construction to be placed on the words "to be divided amongst the next of kin of the deceased legatee." According to English law, there being no reference to the Statute of Distributions, that means to be divided amongst the nearest blood relations, in an ascending and descending line, those of the half-blood being equally entitled with those of the whole blood; but it is argued that I must stop short of that, and say that "next of kin" standing alone means the nearest blood relations of the propositus, and that I must, inasmuch as the legatee was a domiciled German, ascertain who are the nearest blood relations in accordance with German law. In support of this proposition the cases mainly relied on by counsel for the nephews and nieces were *Goodman's Trusts* (2) and *In re Andros* (3), cases which establish that where there is a gift of personalty to the "children" of a named person who is a foreigner, not only those children will take who by English law would be entitled as "children," but the gift must be construed as meaning all those children whose legitimacy is established by the law of their parent's domicil; in other words, you construe the will containing a gift of personalty to children of a foreigner according to English law, but in ascertaining who are the children entitled you have regard to the status of the parent, so that ante nati made legitimate by the subsequent marriage of their parents, in countries where a subsequent marriage renders these children legitimate, are recognised as legitimate under English law, and can take under this gift. That results from the rules followed by the comity of nations which we call international law. Now, it is said here that, this being a

(1) See now the German Civil Code, ss. 1925, 1926, which would seem to have the same effect.—F. P.

(2) 17 Ch. D. 266.

(3) 24 Ch. D. 637.

gift in an English will to the next of kin of a German lady, it is a question of status who are the next of kin; in my opinion, that is not the true view of the law. It appears to me I must construe the will first, and I find the gift means a gift to the legatee's nearest blood relations; it may well be that, in consequence of the legatee being a German, different persons may be entitled from those who would have taken had she been an English woman, as, for instance, suppose she had left children legitimate according to German law, but illegitimate according to English law, these children would take precedence, and would thus oust a sister or a brother who would otherwise have been the persons entitled according to English law, and then the question of status would come in; but that is a different thing from what Mr. Jessel asks me to do here, namely, to put an interpretation upon the words used by this testator which shall entirely exclude the English construction of those words. I have the words "next of kin" in an English will: I ask myself, what do they mean? The answer is they mean nearest blood relations in the ascending and descending line, including those of the half-blood, and I see no authority in any of the cases which have been cited to me for saying that I ought to construe these words as meaning next of kin according to German law. In my opinion, the next of kin are to be ascertained according to English law, subject, as I have already indicated, to the question of status, should any question of that kind arise. The result in the present case is, that I hold that the sister of the half-blood is entitled to this legacy to the exclusion of the nephews and nieces.

Solicitors: *Lawford, Waterhouse & Lawford; Waterhouse & Co.; J. Banks Pittman; Herbert Oppenheimer.*

W. C. D.

FARWELL J.

1902

Jan. 16.

In re SELOT'S TRUST.

[1901 S. 0121.]

Fund in Court—French Subject entitled—Conflict of Laws — French Law— "Prodigal" —Status — Capacity to sue — "Conseil Judiciaire" — Code Napoléon, § 513—*Payment out.*

By the Code Napoléon a French subject of full age, who is of extravagant habits, when adjudged by a French Court of competent jurisdiction to be a "prodigal," is restrained from dealing with, disposing of, alienating, receiving or giving a receipt for his movable property without the consent of a "conseil judiciaire" (legal adviser). But, although this judgment modifies and affects the status of the "prodigal," it is a disqualification unknown to English law, and will be disregarded by English Courts.

Where, therefore, a French subject of full age, who had been adjudged a "prodigal," and placed under the control of a "conseil judiciaire" by the judgment of a French Court of competent jurisdiction, became entitled to a fund in court in England:—

Held, that he was entitled to payment out of the fund to himself on his sole receipt, notwithstanding the opposition of his "conseil judiciaire."

Worms v. *De Valdor*, (1880) 28 W. R. 346; 49 L.J. (Ch.) 261, discussed and followed.

F. C. SELOT, who died in February, 1901, resident in England, by his will bequeathed, in the events which happened, one eighth share of his residuary personal estate upon trust for his grandson E. Portier, who was a French subject, resident in Paris.

E. Portier was born in June, 1866. He was a man of extravagant habits, and in the year 1895 he was, by the judgment of a French Court of competent jurisdiction, placed as a "prodigue" (prodigal) under the control of a legal adviser. By this judgment, which was still in force, E. Portier was debarred from pleading, compromising, borrowing, receiving movable property or giving a discharge therefor, alienating or mortgaging his possessions, without the intervention of M. Demonts, whom the Court appointed as his "conseil judiciaire."

Under these circumstances, the trustees of F. C. Selot's will in August, 1901, paid into court under the Trustee Act, 1893,

the sum of 10,397*l.* 6*s.* 10*d.*, which represented E. Portier's eighth share of the residuary personal estate of the testator.

In September and October, 1901, E. Portier charged the fund in court as security for the repayment, with interest, of moneys advanced to him by Messrs. Lumley & Lumley, his solicitors in England. He now presented a petition asking that the principal, interest, and costs due to his mortgagees might be paid to them, and that the balance of the fund might be paid out to him on his sole receipt. His "conseil judiciaire" opposed the application.

It appeared from the evidence of M. Lax, a French expert, that the provisions of the Code Napoléon relating to the status of a "prodigue" were as follows:—

§ 502. "Interdiction" (legal restraint), or appointment of an adviser, shall operate as from the date of the judgment. All acts subsequently executed by the person under restraint or (as the case may be) without the assistance of the adviser shall be void ("nuls de droit.")

§ 513. "Prodigues" (prodigals) may be prohibited from suing and defending, compromising, borrowing, receiving capital money and giving a discharge therefor, alienating and incumbering their property by mortgage, without the assistance of an adviser appointed to them by the Court.

§ 514. The prohibition from proceeding without the assistance of an adviser may be claimed by those who are entitled to apply for legal restraint. Their application shall be investigated and adjudicated upon in the same manner. Such prohibition can be released only on fulfilling the same formalities.

§ 515. No judgment in the matter of "interdiction," or in that of appointment of an adviser, can be given either in the Court of first instance, or on appeal, without the public authority being represented ("que sur les conclusions du ministère public").

§ 3, para. 3. The provisions of the French law concerning status and capacity govern French persons even if resident (1) abroad.

M. Lax also stated that according to the law of France the

(1) The English of the translation has now been corrected in some points not affecting the general sense. —F. P.

FARWELL J.
1902
SELOT'S TRUST, *In re.*

effect and operation of the said judgment had been to affect or modify the legal status of E. Portier in so far as from the date of the judgment he had become incapable of validly and efficiently performing alone, i.e., without the concurrence of the said M. Demonts, all or any of the various acts specified in § 513 above stated; and, further, that by the law of France a legal adviser must not only assist the person to whom he has been appointed on the occasion of the latter receiving capital money, but also is bound to see to the proper investment of such money, the legal adviser being personally liable for the consequences of his neglect to do so.

Butcher, K.C., and *J. D. Israel*, for the petitioner. The petitioner being of full age cannot be deprived of his ordinary rights in this country by the peculiar provisions of the French law. The judgment of the French Court does not effect a change of status in the "prodigal," but only requires that he should proceed with the assistance of his "conseil judiciaire." But, even if it does affect his status, it is a personal disqualification of a penal nature unknown to English law, to which the Courts of this country will not give effect: Story's Conflict of Laws, 7th ed. ss. 98–104; Dicey's Conflict of Laws, pp. 474–5. The decision of Fry J. in *Worms* v. *De Valdor* (1) is in point.

Jenkins, K.C., and *J. D. Israel*, for the mortgagees. It is admitted that the mortgages were taken with notice of the French law, and, even assuming that they are not enforceable in France, the French law cannot change the status of the petitioner in England, which he holds according to the law of England. It is contrary to the law of England that an adult should not be allowed to deal with and mortgage his property here. It is not suggested that any property passed to the conseil judiciaire or that the petitioner is mentally incapable. The judgment of the French Court is a mere fetter on his actions, and that is repugnant to our law.

Bramwell Davis, K.C., and *Gatey*, for the conseil judiciaire. The petitioner is not entitled to present this petition without the consent of his legal adviser. There is no objection to his

(1) 28 W. R. 346; 49 L. J. (Ch.) 261.

receiving the income of the fund, but it is submitted that the capital should remain in court and be invested for his benefit. It is a matter of the comity of nations how far this Court will recognise the change of status of a foreigner which has been imposed upon him by the law of his own country. *Worms* v. *De Valdor* (1) is not applicable. In that case the conseil judiciaire was not a party to the action, and there was no evidence of the French law before the Court. The decision is criticised in Westlake's Private International Law, 3rd ed. p. 52. Our expert evidence shews that the judgment of the French Court has so modified the civil status of the petitioner that he cannot deal with his property in any way without the consent of his conseil judiciaire. English Courts will recognise in some cases the civil status of foreigners: Dicey's Conflict of Laws, p. 478; *In re Hellmann's Will* (2); *Mackie* v. *Darling* (3); *Scott* v. *Bentley* (4); *Didisheim* v. *London and Westminster Bank* (5); *Sottomayor* v. *De Barros* (6); *Niboyet* v. *Niboyet.* (7) A man, not insane, may be of mental incapacity by the law of his domicil though not so by the law of England. Mental incapacity, not being lunacy, was unknown to the law of England when *Worms* v. *De Valdor* (1) was decided, but now under s. 116 of the Lunacy Act, 1890, the Court has powers of management where a person "through age or infirmity" is incapable. There is some analogy, it is submitted, between that position and the present case. The prodigal is incapable of managing his affairs and is under the control of a quasi-guardian. His position is very similar to that of an infant in English law. The fund being in court, the Court has a discretion in the matter, and will act as a prudent trustee would do: *In re Garnier* (8); *In re Barlow's Will.* (9) It is for the benefit of the prodigal that the capital should be kept in court, and that only the income should be paid out to him.

Stanley Fisher, for the trustees.

No reply was called for.

(1) 28 W. R. 346; 49 L. J. (Ch.) 261.
(2) (1866) L. R. 2 Eq. 363.
(3) (1871) L. R. 12 Eq. 319.
(4) (1855) 1 K. & J. 281.
(5) [1900] 2 Ch. 15.
(6) (1877) 3 P. D. 1.
(7) (1878) 4 P. D. 1, 11, 12.
(8) (1872) L. R. 13 Eq. 532.
(9) (1887) 36 Ch. D. 287.

FARWELL J.

1902

SELOT'S TRUST, *In re.*

FARWELL J. I have considered the reasons given by Fry J. for his judgment in the case of *Worms* v. *De Valdor* (1), and I am unable to distinguish this case in principle, and I certainly feel it my duty to follow that case. The first ground taken in that judgment was, that where the disability or the disqualification in question arises from the principles or custom or positive law of a foreign country, especially of a penal nature, it is not regarded by this Court; and Fry J. declined to regard this particular appointment of conseil judiciaire in that very case on that ground. Further, he went on to hold (and with all respect I am not quite sure how far he ought to have decided the question of French law without evidence upon it), upon a perusal of the works of two eminent writers on French law, that there was no change of status in that case, and that consequently the plaintiff was not affected by the order of the French Court. So far as regards the first point, this case is on all fours with it; but, so far as regards the second point, I should not be bound by a mere finding of fact especially as I certainly do not see what evidence he proceeded upon. But I come to the same conclusion on the facts of this case, for it is quite obvious that the eminent French lawyer, M. Lax, who makes the affidavit in this case as to the French law, had his attention called to the question of the change of status, and all that he can say is that the effect and operation of the French judgment has been to affect and modify the legal status. Affecting and modifying the status appears to me to be a very different thing from changing the status. As I understand it, the status is one indivisible whole. If you alter the status you alter the whole, although the rights which under the new status you possess may be in many respects similar to those which you possessed under your former status. For example, a woman on her marriage changes her status from that of a feme sole, but many of her rights are the same as before her marriage. In my opinion, here the onus is on the person asserting that there has been a change of status to prove it, and this affidavit does not satisfy me that there has been a change of status. Therefore, I follow the case of *Worms* v. *De Valdor* (1) on this point also.

(1) 28 W. R. 346; 49 L. J. (Ch.) 261.

The only other point made is, that I have a discretion in the matter. Now, it follows, from what I have already said, that I have no discretion at all. If an adult person who is absolutely entitled to a fund in court comes and asks the Court to pay it out, I am not aware of any dispensing power which enables the Court to say, "I do not think it is good for you to have it, and therefore I withhold it." It is quite true that in the case of *Cunynghame* v. *Thurlow* (1) Shadwell V.-C.—it was a case where the father of a child released his power of appointment over a fund in order to entitle himself as executor of his child to payment of the share which the child took in the fund in default of appointment—viewed the father's conduct with such reprobation as to say that it disentitled him to payment of the child's share; but that decision was subject to observation by the Court of Appeal in the case of *In re Radcliffe* (2), and was not followed. The Court has no jurisdiction to refuse to pay out to a man that which is his property. The case of *In re Barlow's Will* (3) was quite different. The person applying there had no legal right to the payment out. The property was not vested in him. He was a Master in Lunacy in New South Wales, and had no legal right at all; and it appears to me that the judgment of Fry L.J. in that case, so far as it goes, is a decision against the argument that has been urged before me on behalf of the conseil judiciaire. The result is that the order for payment out must go.

Solicitors for petitioner and his mortgagees: *Lumley & Lumley.*

Solicitors for conseil judiciaire: *Kingsford, Dorman & Co.*

Solicitors for trustees: *Knapp-Fisher & Sons.*

(1) (1832) 1 Russ. & My. 436, n.; 32 R. R. 242.

(2) [1892] 1 Ch. 227.

(3) 36 Ch. D. 287.

H. L. F.

BUCKLEY J.

1902

Jan. 30, 31; *Feb.* 1, 3.

ACETYLENE ILLUMINATING COMPANY *v.* UNITED ALKALI COMPANY.

[1901 A. 128.]

Patent—International Convention—Application by Patentee for Protection in Foreign State—Subsequent Publication of same Patent by another Person in this Country—Later Application by Patentee in this Country for Patent—Anticipation—Certificate of Objections—Certificate as to Validity of Patent being in question—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 29 *sub-ss.* 2, 6, 31, 103 *sub-ss.* 1, 2.

When a patentee has applied under s. 103 of the Patents, Designs, and Trade Marks Act, 1883, for protection for any invention in any foreign State with which the British Government has made an arrangement and afterwards makes an application in this country for his patent, he has two alternatives: he may either take a patent to run from the date of his prior application to the foreign State, or he may take a patent to run from the date of his English application, but in either alternative the date of his application in this country for the patent to which he is entitled under the section if he asks for it must be within seven months from the date of his foreign application: in other words, he must elect from what date his patent is to run within seven months from the date of his foreign application.

The plaintiffs sued and went to trial in respect of an alleged infringement of four patents. At the trial they abandoned their case as to the first three patents and proceeded on the fourth. The Court held that the fourth patent was invalid for want of novelty, and that there had been no infringement even if it had been valid, and dismissed the action with costs:—

Held, that the Court could not give a certificate under s. 29 of the Patent Act, 1883, that the particulars of objection delivered by the defendants in respect of the first three patents were reasonable and proper.

Mandleberg v. *Morley*, (1895) 12 Rep. Pat. Cas. 35, followed.

In respect of the fourth patent the defendants had delivered particulars of objection, including (*a*) a reference to certain inventions which shewed that the patent was void for want of novelty; (*b*) a specification and particulars referring to certain electric furnaces previously invented by other persons. The patent made no claim to an electric furnace as part of the invention, but claimed for a process in which electric furnaces were used:—

Held, that it was a matter for proof and not for particulars of objection to shew what the furnaces were, and that the defendants were not entitled to a certificate under s. 29 as to the particulars of objection (*b*).

The plaintiffs asked that, notwithstanding the fourth patent had been

declared invalid, the Court should give them a certificate, under s. 31 of the Act, that the validity of the patent had come in question:—

Held, that the certificate under the section could only be granted where the patent had been declared valid.

Haslam Co. v. *Hall*, (1887) 5 Rep. Pat. Cas. 1, 27 (see also ibid. 144), not followed.

THIS action was brought by the Acetylene Illuminating Company, Limited, as sole and exclusive licensees, and the Willson Laboratory Company, as registered owners of four patents, for (1.) an injunction to restrain the defendants from manufacturing, selling, supplying, or using in this country calcium carbide manufactured according to or in manner described in the specifications filed in pursuance of the four patents or according to or in any manner only colourably differing from the same, and generally from infringing the rights of the plaintiffs in respect of the said several letters patent; (2.) damages, or an account of profits; (3.) delivery up of infringement material; (4.) and (5.) costs and further relief.

The four patents sued on were—

(1.) No. 9361, dated June 17, 1890, granted to T. L. Willson;

(2.) No. 21,701, dated November 28, 1892, also granted to Willson;

(3.) No. 16,342, dated August 27, 1894, granted to G. B. Ellis; and

(4.) No. 16,705, dated September 1, 1894, granted to Willson.

Patent (1.) was for "Improvements in electric reduction of metals, and in apparatus therefor."

Patent (2.) was for "Improvements in the reduction or treatment of refractory metallic compounds by electric smelting."

Patent (3.) was for "Improvements in the production of metallic carbides and of illuminating gas derived therefrom."

Patent (4.) was for "Improved metallic carbides, applicable for use in the production of acetylene, and means for producing the same."

In the complete specification of patent (4.) the inventor stated that the invention related to the production of metallic

BUCKLEY J. 1902 ACETYLENE ILLUMINATING COMPANY v. UNITED ALKALI COMPANY.

carbides suitable for the production of acetylene gas which might be used for illuminating, heating, and other purposes. He then proceeded to describe his process of treating calcium oxide or other suitable compound containing calcium by "exposure to the intense heat of an electric arc in an electric furnace." After stating the result he continued: "In carrying out my invention I employ a suitable electric furnace, such as a Siemens arc furnace," and he stated how he used the furnace in his process. What he claimed was—"1. The manufacture of crystalline calcium carbide by subjecting lime and carbonaceous matter in suitable proportions to the continued action of electrically generated heat, substantially as hereinbefore described. 2. The process of producing crystalline calcium carbide, consisting in subjecting lime and carbonaceous matter in suitable proportions to the continued heat of an electric arc between a carbon pencil above and a conducting hearth, or pool of reduced material thereon, beneath, substantially as hereinbefore described. 3. The process of treating a compound containing calcium with carbonaceous matter in an electric furnace as hereinbefore described to produce a carbide of the metal or metals contained in such compound and afterwards acting upon the carbide so formed with water to generate a hydrocarbon gas, substantially as hereinbefore described. 4. The process of treating calcium oxide with carbonaceous material in an electric furnace as hereinbefore described to produce calcium carbide, and afterwards acting upon the calcium carbide with water to liberate acetylene substantially as described."

The defendants denied infringement, and pleaded that all the patents were invalid. In their particulars of objection they stated that the alleged inventions under patents (1.), (2.) and (3.), were not new, and they gave particulars of specifications and other publications which, as they alleged, shewed want of novelty in the three patents. They also in their particulars of objection alleged that the inventions under patent (4.) were not new, and referred amongst other things to discoveries by M. Moissan, a previous American patent, the specification of

the patent for the Siemens furnace, and an electric furnace known as Cowles' furnace.

The action was brought to trial on all the four patents; but at the trial, which commenced on January 30, 1902, the plaintiffs abandoned their case as to the first three patents, and proceeded only upon patent (4.).

A preliminary question arose on the first day of the trial whether, under the circumstances of the case, the defendants could rely on an alleged anticipation of patent (4.).

On February 28, 1894, Willson applied for protection in the United States of America in respect of the invention the subject of the patent.

On March 16, 1894, there was a publication at the Patent Office Library in this country by a man named Moissan of what the defendants alleged to be the same invention.

On September 1, 1894, Willson lodged his application in this country for a patent. That application was in the common form. He did not apply at that time, under s. 103 of the Patents, Designs, and Trade Marks Act, 1883 (1), for the patent to be dated in his favour as of February 28, 1894, the date of his application in the United States.

(1) 46 & 47 Vict. c. 57, s. 103: "(1.) If Her Majesty is pleased to make any arrangement with the government or governments of any foreign State or States for mutual protection of inventions, designs, and trade-marks, or any of them, then any person who has applied for protection for any invention, design, or trade-mark in any such State, shall be entitled to a patent for his invention or to registration of his design or trade-mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the protection obtained" (date of the application) "in such foreign State.

"Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade-mark within four months, from his applying for protection in a foreign State with which the arrangement is in force. . . .

"(2.) The publication in the United Kingdom, or the Isle of Man during the respective periods aforesaid of any description of the invention, or the use therein during such periods of the invention, ... shall not invalidate the patent which may be granted for the invention. . . .

"(3.) The application for the grant of a patent . . . . under this section, must be made in the same manner as an ordinary application under this Act. . . ."

BUCKLEY J.

1902

ACETYLENE ILLUMINATING COMPANY v. UNITED ALKALI COMPANY.

The seven months from the date of the application in America expired on September 28, 1894.

On June 20, 1895, Willson's solicitors wrote to the comptroller stating that Willson desired to avail himself of the provisions of s. 103 of the Patents, Designs, and Trade Marks Act, 1883; but the comptroller replied that he would not be justified in antedating the patent under the provisions of that section, no application for such antedating having been made within seven months of the date of the foreign application.

On June 27, 1895, Willson lodged his complete specification, which was accepted on November 30, 1895, and his letters patent were sealed as of the date September 1, 1894.

Under these circumstances the publication by Moissan on March 16, 1894, was a prior publication unless Willson's application was held to date back to February 28, 1894, the date of his foreign application.

Moulton, K.C., Roger Wallace, K.C., and *Colefax*, for the plaintiffs. On behalf of the plaintiffs we claim that Willson, the patentee, was entitled under the provisions of s. 103 of the Act of 1883 to have his patent dated as of the date of his American application, namely, February 28, 1894. Sub-s. 1 of that section provides that any person who has applied for protection for any invention in a foreign State with which an arrangement shall have been made shall be entitled to a patent for his invention in priority to other applicants, and such patent shall have the same date as the date of the protection obtained in such foreign State, provided his application is made in the case of a patent within seven months from his applying for protection in the foreign State. Then sub-s. 3 provides that the application for the grant of a patent must be made in the same manner as an ordinary application under the Act. The patentee made his application for a patent in the usual form on September 1, 1894, that is, within seven months from the date of his foreign application. If a person who has made an application for a patent in one of the countries with which there is a convention applies within seven months he shall be entitled to a patent in priority of others, and publica-

tion in this country during that period shall not be considered to be a publication of the patent.

The "application" referred to in the first proviso to sub-s. 1 of s. 103 is clearly the application for the patent. There is no suggestion that the date shall be applied for within seven months of the application to the foreign State. Willson applied for his patent in this country within seven months from the date of his foreign application; there are no words in the section which state that at the date of the application he must elect at what date his patent is to be dated; he has an option to take a patent of one or other date, and until he takes his patent his option does not expire. We submit that Willson having applied for a patent in this country within seven months of his application in America, he was entitled to have his patent dated as of the date of that application; and, if that is so, then the publication by Moissan, which was undoubtedly subsequent to that date, was not an anticipation upon which the defendants can rely.

[They referred to *British Tanning Co.* v. *Groth.* (1)]

Cripps, K.C., Lord Robert Cecil, K.C., A. J. Walter, and *Bucknill,* for the defendants. The proviso is that the application must be made in the case of a patent within seven months from applying for protection in the foreign State with which the arrangement is in force. The first application that was made in this case under s. 103 at all was made on June 20, 1895, whereas the date when Willson applied for protection in a foreign State was February 28, 1894, nearly a year and a half before. How, on any conditions, can that be brought within the proviso? The application which is made must mean the application in reference to s. 103. Willson clearly is not within the protection given by that proviso. According to the other side the seven months could be extended almost indefinitely, at all events till the grant of the patent in this country. There is nothing about the grant of a patent in this country here at all. What is being dealt with is an application to have the advantage of the protection afforded by this s. 103, and the patentee has to make that application within seven months

(1) (1891) 8 Rep. Pat. Cas. 113.

BUCKLEY J.
1902
ACETYLENE ILLUMINATING COMPANY v. UNITED ALKALI COMPANY.

from the time that he has got the protection in the foreign State with which the arrangement is in force. And that Willson did not do. We submit that the application to have the patent antedated was not made in time, and that the actual date must be taken to be conclusive, and consequently that we are entitled to rely on Moissan's publication as being an anticipation.

Moulton, K.C., in reply.

BUCKLEY J. This is an action for infringement. The defendants seek to rely upon a certain anticipation, and the preliminary question which I have now to decide is whether, having regard to the dates which I shall presently state, the defendants can rely upon that as an anticipation. I decide it now in order to clear the matter as regards taking the evidence. The material facts are these.

On February 28, 1894, the patentee, whose successors in title are the plaintiffs in this action, made an application in the United States in respect of the invention the subject of this patent. On March 16, 1894, there was publication at the Patent Office Library of a communication from a man named Moissan. On September 1, 1894, the plaintiff's patentee lodged his application in this country for a patent. That application was in common form. He did not apply under s. 103 of the Act of 1883 for the patent to be dated in his favour as of February 28, 1894, the date of the application in the United States. The seven months limited by s. 103 expired on September 28, 1894. Subsequently, namely, on June 20, 1895, just before lodging his complete specification, his solicitors wrote to the comptroller, and the substance of that letter was that the patentee wished to avail himself of s. 103. The comptroller replied on the next day that he would not be justified in antedating the patent under the provisions of s. 103, no application for such prior dating having been made within seven months of the date of the foreign application. On June 27, 1895, the patentee lodged his complete specification, which was accepted on November 30, 1895, and his letters patent were sealed as of the date September 1, 1894. That

being so, the publication by Moissan on March 16, 1894, was a prior publication unless the patentee's patent can be treated as dated back to February 28, 1894. Mr. Moulton argues that can be done. I am of the contrary opinion. It seems to me that the effect of s. 103 is this. Where a man has made an application in a foreign State, he is entitled under sub-s. 1 to a patent for his invention under this Act in priority to other applicants, and such patent or registration shall have the same date as the date of the application in the foreign State. The effect of that is that he is entitled to that thing if he asks for it. If the applicant has previously applied to a foreign State he has two alternatives, and may take which he likes: he may take a patent to run from the date of his prior application to the foreign State (which will, of course, be for a shorter time having regard to the time that has expired since that); or he may, if he is so minded, take a patent to run for fourteen years from the date of his English application. He is entitled to the former under s. 103 if he asks for it; he is not bound to ask for it, but he is entitled to it if he does. Then the section goes on: "Provided that his application is made in the case of a patent within seven months from his applying for protection in the foreign State with which the arrangement is in force." Now, what is the application there spoken of? In my opinion, it is his application under this section—his application in which he says, "Of the two alternatives offered me, I will take the patent dating back to the date of my foreign application." It seems to me that his election of exercising the option to which he is entitled must be made within the seven months. Let us see what reason there is for that. Suppose A. is a person who has applied subsequently to the date of B.'s application in the foreign country, but before B.'s application in this country. If B. avails himself of s. 103, he ranks in priority to A. If not, he comes behind A. Now, when is A. to know the date at which his rights in that respect are determined? He is entitled to know, I conceive, within the seven months. He ought to be able to say within the seven months, "I will or I will not go on with my application, according as the man who applied abroad before me, and in England after

BUCKLEY J. 1902 ACETYLENE ILLUMINATING COMPANY v. UNITED ALKALI COMPANY.

me, is going to avail himself of the later or earlier date." It is said that sub-s. 2 of s. 103 is some indication to the contrary. I agree that the wording of sub-s. 2 of s. 103 is a little difficult, but I read it as being a sub-section dealing only with the state of things which is to take place if the man avails himself of this section, or, to put it shortly, that the sub-section is to be read as if it were "shall not invalidate the patent which may be granted under the provisions of this section." It was not intended that if the man had made first a foreign application and secondly an English application, and then took his grant under his English application he should then be protected from all prior applications. That would be inconsistent with all the rest of the section. Romer J. in the case of *British Tanning Co.* v. *Groth* (1) said: "In my opinion it never was intended by sub-s. 2 of s. 103 to apply sub-s. 2 to all cases of patents where the patentee had previously obtained a patent in a foreign country, but only to apply it as part of the general provisions of s. 103 in cases where the patentee was availing himself of the privileges given to him by that section." If I may properly do so, I entirely agree with that expression of opinion.

Now, what took place in this case was this. The seven months elapsed on September 28, 1894, and before that time this patentee had not sought to avail himself in any way of the section. Subsequently, on June 20, 1895, he was desirous of doing so, but the Patent Office declined to seal his patent as of the date of his foreign application, namely, February 28, 1894, and, in my opinion, rightly. Whether rightly or wrongly, the patent which is being sued upon is in point of fact of the date of September 1, 1894, and it appears to me that that is conclusive on the point. It seems to me, therefore, that the alleged anticipation by Moissan is one of which the defendants will be in a position to avail themselves.

The trial of the action proceeded, and on February 3, 1902, Buckley J. delivered judgment, in which he held—(1.) that patent (4.) was invalid for want of novelty; and (2.) that, even

(1) 8 Rep. Pat. Cas. 113, 122.

if it had been valid, the defendants had not infringed it. He therefore dismissed the action with costs.

Lord Robert Cecil, K.C., for the defendants. The plaintiffs have in effect asked for leave to discontinue their action in respect of patents (1.), (2.), and (3.), and it should be made a term of the discontinuance that they should pay the same costs as if the action had proceeded on all four patents, and the particulars of objection for want of novelty to the first three patents had been gone into, and a certificate had been given, under s. 29, sub-s. 6, of the Patent Act, 1883, that the particulars were reasonable and proper.

[BUCKLEY J. There was no application for leave to discontinue the action. The plaintiffs came into Court on four patents, but submitted to judgment against them on the first three. Suppose the plaintiffs had come into Court on only one patent, and submitted to have their action dismissed with costs, what would have been done with the costs of the particulars of objections?]

That would have been a different case. Under Order XXVI., r. 1, the plaintiffs could only discontinue this action by leave.

Colefax, for the plaintiffs, referred to *Mandleberg* v. *Morley*. (1)

BUCKLEY J. I simply dismiss the action with costs. It may be an extraordinary state of things, but if a plaintiff in a patent action comes into Court and says, "I do not mean to support my statement of claim," as far as I know, all the Court can do is to dismiss his action with costs. It cannot certify anything as regards the particulars, because it does not know, and under the circumstances it cannot know, whether the particulars are proper or improper. I give no certificate as to the particulars of objection to the first three patents.

Lord Robert Cecil, K.C., and *A. J. Walter*, for the defendants. We ask for a certificate, under s. 29, sub-s. 6, of the Act, that the particulars of objection delivered by us as regards patent (4.) are reasonable and proper. It has sometimes been

(1) 12 Rep. Pat. Cas. 35.

BUCKLEY J.
1902
ACETYLENE ILLUMINATING COMPANY v. UNITED ALKALI COMPANY.

said that no certificate can be given if the particulars have not been examined; but there is the evidence of one of the witnesses that it was necessary for him to examine all the anticipations mentioned.

[BUCKLEY J. You can only get the costs of the particulars which you relied on, namely, the papers of Moissan and the American patent.]

Several other particulars were referred to, including, for instance, the patent and papers relating to Siemens' electric furnace.

[BUCKLEY J. The patentee did not claim a furnace as part of his invention. He claimed a process in which he used a known furnace.]

The defendants had to bring before the Court the state of knowledge with regard to furnaces when the patent was taken out. Under the head of common knowledge the defendant cannot refer to any single specification without referring to it in his particulars of objection.

Colefax, for the plaintiffs, said that he did not object to the particulars so far as they related to Moissan or the American patent.

BUCKLEY J. I will say on this particular point—I do not know whether it is new or not—that, as I understand s. 29, sub-s. 2, the defendant has to give particulars of the objections on which he relies, and under s. 29, sub-s. 6, costs are not allowed in respect of any particular delivered "unless the same is certified by the Court or a judge to have been proven, or to have been reasonable and proper." I think that under sub-s. 6 what I have to certify is that a particular of objections under sub-s. 2 is reasonable and proper. The defendants have asked for the costs of particulars of objections, naming—I will take it as an instance—the specification of the Siemens arc furnace. The Siemens arc furnace was no anticipation. Its existence was no objection at all to the validity of the plaintiffs' patent. The patentee had in his patent mentioned a thing called a Siemens arc furnace. To ascertain what that was, it might be necessary to prove Siemens' specification as being

that which defined that sort of furnace. That would be a matter of evidence. A witness could have been called and asked what the Siemens arc furnace was. He would say it was a thing made according to the specification, which could be produced, and it would be then proved that that was what was called a Siemens arc furnace. It is suggested by the defendants that you could not do that in a patent action unless you had put the specification in your particulars of objections. I confess that that does not commend itself to my intelligence; I do not see how that is so. You can prove anything that is material in an action, subject to this limitation, that if it is an objection you must give particulars of it under the statute. If it is not an objection you may prove it in the usual way without having given particulars of it under the statute. I therefore do not certify with respect to the Siemens, or the Cowles', or the other furnaces which were referred to merely for the purpose of ascertaining what electric arc furnaces were.

Colefax. I have to apply for a certificate, under s. 31 of the Patent Act, 1883, that the validity of patent (4.) came into question. The certificate may be granted although the patent is declared invalid: *Haslam Co.* v. *Hall.* (1) There the patent had been declared invalid; but Stephen J. is reported to have said: "I must leave any other judge to certify in any future action. You can always say that the patent was held invalid, and judgment was given accordingly. I cannot refuse to certify, and I shall certify that the validity of the patent came in question." The case is referred to in all the text-books dealing with patent law as being an authority for granting the certificate.

Lord Robert Cecil, K.C. The case has never been followed, and s. 31 shews that the certificate cannot be given.

BUCKLEY J. The meaning of s. 31 seems to me quite plain. If in an action for infringement the plaintiff succeeds, the Court may certify that the validity of the patent has come in

(1) 5 Rep. Pat. Cas. 1, 27, 28.

BUCKLEY J.
1902
ACETYLENE ILLUMINATING COMPANY v. UNITED ALKALI COMPANY.

question with the result that in any subsequent successful action for infringement the defendant has to pay solicitor and client costs. If the patent is held invalid in the first action it cannot be unreasonable that a defendant in a second action should deny validity, and I fail to see on what principle it can be supposed that the Act meant to make him pay in such case solicitor and client costs. I am referred to a case before Stephen J. of *Haslam Co.* v. *Hall* (1), which I am told is to the contrary effect. I cannot think that the learned judge said what is there reported. He must, I think, have granted the certificate, not because or notwithstanding that the patent was held invalid, but because it had been held valid to a certain extent, namely, except as regards the second claim. I notice that in *Badische Anilin und Soda Fabrik* v. *Société Chimique* (2) the certificate granted in *Haslam Co.* v. *Hall* (1) is dealt with on that footing. But I must add that I do not understand the words attributed to the learned judge: "I must leave any other judge to certify in any future action." Those words are intelligible only if he was refusing the certificate, which he was not. (3) I think the report must be inaccurate. I refuse the certificate.

Solicitors for plaintiffs: *Guedalla & Cross.*
Solicitors for defendants: *J. H. & J. Y. Johnson.*

(1) 5 Rep. Pat. Cas. 1, 27, 28.

(2) (1897) 14 Rep. Pat. Cas. 875, 892.

(3) From the report of the case in the Court of Appeal, *Haslam Foundry and Engineering Co.* v. *Hall*, (1888) 20 Q. B. D. 491; 5 Rep. Pat. Cas. 144, it appears that Stephen J. did grant a certificate that the validity of the patent came in question, and that the Court of Appeal held, without deciding whether the certificate could be given under the circumstances, that such a certificate was not a judgment or order against which an appeal lay.—F. E.

F. E.

In re FENWICK, STOBART & CO., LIMITED.

DEEP SEA FISHERY COMPANY'S (LIMITED) CLAIM.

[00344 of 1901.]

BUCKLEY J.

1902

Feb. 11.

Companies — Winding-up — Bill of Exchange — Dishonour — Notice — Person acting as Secretary of two Companies — Knowledge in one Character — Presumption of Notice in other Character — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 48, 49, 50, *sub-s.* 2 (*b*).

Where a man acts as secretary of two companies, it is not true as a general proposition that a fact which comes to his knowledge as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship. In order to make it notice, it must be shewn that it was his duty to the first company to communicate his knowledge to the second company. (1)

THIS was a summons in the voluntary liquidation of Fenwick, Stobart & Co., Limited, for an order that the applicant (the voluntary liquidator of the Deep Sea Fishery Company, Limited) might be admitted as a creditor for 3525*l.*, the amount of a bill of exchange drawn by the former company.

Three companies were concerned in the transaction which led to the claim—namely, Fenwick, Stobart & Co., the Deep Sea Fishery Company, and a company called the Fiskeri Aktieselskabet Gardar, generally known as the Gardar Company. These companies carried on fishery businesses and had offices in Iceland and in London. Their head offices were in the same room in London, and a Mr. Higgins acted as secretary for all three companies. In 1900 the Deep Sea Fishery Company held a large number of shares in the Gardar Company, and the Gardar Company owed them a large sum, and were also indebted to Fenwick, Stobart & Co. to the amount of 3525*l.* At a meeting of the directors of the Deep Sea Fishery Company held on August 13, 1900, Mr. Higgins, on behalf of Fenwick, Stobart & Co., threatened to enforce payment of the 3525*l.*; and an arrangement was come to whereby, amongst

(1) Compare *In re Hampshire Land Co.*, [1896] 2 Ch. 743, not referred to in the argument of the principal case.

BUCKLEY J. 1902 DEEP SEA FISHERY COMPANY'S (LIMITED) CLAIM.

other things, the Deep Sea Fishery Company passed a resolution to purchase from Fenwick, Stobart & Co. the acceptance of the Gardar Company at seven days' sight for 3525*l.* Thereupon Fenwick, Stobart & Co. drew a bill of exchange to their order on the Gardar Company for 3525*l.*, payable seven days after date; this bill was accepted by the Gardar Company, and indorsed by Fenwick, Stobart & Co. to the order of the Deep Sea Fishery Company. The Deep Sea Fishery Company gave to Fenwick, Stobart & Co. a cheque for 3525*l.*, and took over the bill. The evidence proved that every one concerned knew the bill would be dishonoured. The bill was presented and dishonoured, and the Deep Sea Fishery Company took proceedings against the Gardar Company, issued execution, and received from one sheriff 1426*l.* and from another 1740*l.*, leaving a balance of 359*l.* still due, and it was to the extent of this balance that they now claimed to prove in the winding-up of Fenwick, Stobart & Co.

Mr. Higgins, as secretary of the Deep Sea Fishery Company, of course knew that the bill was dishonoured, but he stated in his affidavit that he never gave notice to Fenwick, Stobart & Co. of the dishonour because it was never intended to make them liable upon it. The Deep Sea Fishery Company, however, contended that, as he was secretary of both companies, it must be taken that Fenwick, Stobart & Co. had had notice of it through him.

Levett, K.C., and *E. Ford*, for the applicants. The result of the transaction was to make Fenwick, Stobart & Co. liable on the bill. We bought the bill, and became holders of it for value, and can sue them both as drawers and indorsers. We did not buy the debt so as to step into the shoes of Fenwick, Stobart & Co., but the bill.

Secondly, Fenwick, Stobart & Co. had through their secretary notice that the bill was dishonoured. When a person who acts in two capacities and is secretary of two companies has in his hands as secretary of one company a dishonoured bill drawn by the second company, he cannot say that as secretary of the second company he has no notice of the dishonour.

Higgins was the agent of Fenwick, Stobart & Co. for the purpose of receiving notice. The secretary of a company is the proper person to give and receive notice. A man who holds two offices cannot be divided into two persons, and cannot be called upon to write a letter giving formal notice to himself.

[BUCKLEY J. It was not necessary that Higgins should write a formal letter to himself. The true test to be applied is whether it was his duty as secretary of the Deep Sea Fishery Company to tell himself as secretary of Fenwick, Stobart & Co. that the bill had been dishonoured. It could not be his duty to do so if Fenwick, Stobart & Co. were not to be liable on the bill.]

But, in fact, he had notice as secretary of Fenwick, Stobart & Co.

Further, notice of dishonour may be waived under s. 50, sub-s. 2 (*b*), of the Bills of Exchange Act, 1882. All parties knew that the bill would be dishonoured, so no notice of dishonour would be necessary, and the Court will assume that it was waived.

[BUCKLEY J. That applies where there ought to be notice, and none has been given.]

English Harrison, K.C., and *D. C. Leck*, for the voluntary liquidator of Fenwick, Stobart & Co. The real nature of the transaction was an agreement that the Deep Sea Fishery Company should pay this sum to save the Gardar Company from Fenwick, Stobart & Co., and should not have any further rights against Fenwick, Stobart & Co. The word "purchase" in the resolution was only used in contradistinction to "discount." The Deep Sea Fishery Company did not buy the bill in the ordinary sense; they bought the debt with the right to stand in the shoes of Fenwick, Stobart & Co. against the Gardar Company in respect of it.

Secondly, their knowledge that the bill was going to be dishonoured is not a waiver of the right to notice: *Caunt* v. *Thompson*. (1) "Notice of dishonour means notification of dishonour, i.e., formal notice. The fact that the drawer or indorser of a bill knows that it has been dishonoured does

(1) (1849) 7 C. B. 400, 409.

BUCKLEY J.
1902
DEEP SEA FISHERY COMPANY'S (LIMITED) CLAIM.

not dispense with the necessity for giving him notice of dishonour": Chalmers' Bills of Exchange, 5th ed. p. 154. Notice of dishonour must be given to the drawer; it is unnecessary to add that he will be held liable, but formal notice must be given, and that is exactly what Higgins did not do.

E. Ford, in reply.

BUCKLEY J. stated the facts, and continued:—The first question is: What was the real transaction between the parties? Was it a transaction under which the Deep Sea Fishery Company were to have the liability of Fenwick, Stobart & Co. as drawers and indorsers, which, of course, primâ facie they would have? I answer, No. The transaction was one under which, in substance, the debt was to be paid to Fenwick, Stobart & Co., and the bill, which was a bill for only seven days, was to put the Deep Sea Fishery Company in a position to sue the Gardar Company in a summary manner. It was never intended that they should have recourse against Fenwick, Stobart & Co. as drawers. [His Lordship referred to the correspondence, and proceeded:—]

The true nature of the transaction, I think, was that the Deep Sea Fishery Company were minded to put themselves in the position to get a judgment against the Gardar Company, excluding Fenwick, Stobart & Co. from getting that judgment, because it better suited them that they should hold the judgment than that Fenwick, Stobart & Co. should. In other words, I think the true transaction was a purchase of the debt, and not a purchase of the debt with a further liability on Fenwick, Stobart & Co. in the event of the debtor not paying it.

But there is another point, which involves considerations of some general importance, and it is this: Mr. Higgins was secretary of the Deep Sea Fishery Company, the holders of the bill, and he was also secretary of Fenwick, Stobart & Co., the drawers and indorsers of the bill. In the former character he knew that the bill was dishonoured. Was that fact notice of dishonour to himself as secretary of Fenwick, Stobart & Co.? In other words, is it true as a general proposition that

a fact which comes to the knowledge of a man as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship? In my opinion it is not. What Mr. Higgins says in paragraph 8 of his affidavit is this: "Fenwick, Stobart & Co., Limited, never received notice of dishonour of the bill from any one. I never gave any notice of the dishonour of the bill to them, as I was fully aware that it had never been the intention of any one connected with the transaction that they should be liable, and that the bill was, as above stated, merely drawn by them at the request of and for the purposes of the Deep Sea Company." So that here the secretary of the Deep Sea Fishery Company knew the fact under circumstances such as that it was not his duty to communicate it to himself as secretary of Fenwick, Stobart & Co. I think that the true test is this: Where a man holds a double character, it is not necessary that he should write a letter from himself in one character to himself to inform himself in another character. What the Court has to see is whether the information he gets, as secretary of the one company, comes to him under such circumstances as that it is his duty to communicate it to the other company. Suppose, for instance, as secretary of the first company he learns something which it would be a breach of his duty to that company to communicate to the other company. I should say certainly that is not notice to the other company. It depends upon the circumstances relating to the particular case. Here he knew of the dishonour of the bill by the Gardar Company under circumstances under which it was not his duty to communicate it to Fenwick, Stobart & Co. Therefore, I think, there was no notice of dishonour to Fenwick, Stobart & Co. The result is that, upon that ground also, the drawers, if ever they were liable, would be discharged.

Solicitors: *Stokes & Stokes; Lowless & Co.*

H. C. R.

JOYCE J.
1902
Jan. 15, 16, 17.

HOUNSELL *v.* DUNNING.

[1900 H. 3155.]

Statute of Limitations—Real Property—Action to recover Land—Person under Disability—Claim by Husband in Right of Wife—Real Property Limitation Acts (3 & 4 *Will.* 4, *c.* 27, *ss.* 16, 17, 34; 37 & 38 *Vict. c.* 57, *ss.* 3, 5)—*Will—Construction—Gift of "all the Share of my late Husband's Estate"—Real Estate, whether passed.*

B. died intestate in December, 1869, possessed of copyholds held of the manor of Taunton Dene, which by the custom of that manor devolved upon his widow. He left surviving him, besides his widow, his son P. and two daughters, of whom one was the plaintiff Mrs. H. The widow died on January 7, 1870, having by her will devised to her two daughters "the share of her late husband's estate" that she took or was entitled to on his decease, to be divided between them share and share alike. She also gave them pecuniary legacies, and declared that she made this provision for them in lieu of the freehold and copyhold lands which descended to her son on the intestacy of her husband; and she appointed H., the husband of Mrs. H., to be her executor. On her death it was erroneously assumed that the Taunton Dene copyholds had, upon B.'s death, devolved upon P. as his customary heir, and from that time the rents were collected by H., and applied to the maintenance of P. until he attained twenty-one, in 1878, when H. accounted to him and handed over the title-deeds. P. continued in possession till his death in 1890, having devised all his real estate to the defendants. The facts as to the devolution of the copyholds on B.'s death having been discovered, on September 25, 1900, an action was brought by Mrs. H. and her husband in her right for a declaration that they were entitled to a moiety of the copyholds under the will of B.'s widow:—

Held, assuming that the copyholds passed under the will, that inasmuch as P. had been in possession through H. from the death of the widow, the action was barred by s. 5 of the Real Property Limitation Act, 1874, it not having been brought within thirty years of January 7, 1870, when the plaintiffs' right first accrued; but,

Semble, on the construction of the will, the copyholds did not pass thereunder.

Henry Hine Ball, who died intestate on December 26, 1869, was at the date of his death possessed of certain copyhold hereditaments held of the manor of Taunton Dene, in the county of Somerset, for an estate of inheritance in customary fee simple.

Henry Hine Ball left him surviving his widow, Jemima Ball,

and three children—namely, the plaintiff Mary Hounsell, born January 12, 1850; Henrietta Hine Ball, born January 8, 1855; and Philip Henry Ball, born February 23, 1856.

According to the custom of the manor, the said copyholds devolved upon Jemima Ball as the customary heiress-at-law of H. H. Ball. Jemima Ball, by her will dated January 6, 1870, gave to the plaintiff Mary Hounsell and to Henrietta Hine Ball "all and singular the share and proportion of my late husband's estate I take or to which I am entitled on his decease to be equally divided between them share and share alike. And I also give and bequeath to my two said daughters the sum of 500*l*. . . . . to be divided between them share and share alike, and I make this provision for them in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband." And the testatrix appointed James Slee Bult and the plaintiff George Collins Hounsell (the husband of the plaintiff Mary Hounsell) to be her executors.

Jemima Ball died on January 7, 1870. There was no evidence that she ever took possession of the copyholds in question. No rents were received by her, and none were accounted for in the residuary account of her estate. She was in London at the death of her husband, and died there without ever having returned into Somersetshire. Probate of her will was granted to the plaintiff G. C. Hounsell.

At the death of Henry Hine Ball it was erroneously considered by all parties interested that the copyholds in question devolved, together with certain freeholds of which he also died possessed, upon Philip Henry Ball as his heir-at-law. Acting upon this assumption, George Collins Hounsell, through his solicitor and agent, collected the rents of the copyholds from the death of Jemima Ball, if not from the death of Henry Hine Ball, and expended them in the maintenance of Philip Henry Ball until he attained the age of twenty-one years in 1877, and in 1878 G. C. Hounsell accounted to Philip Henry Ball for the rents so received, and handed over to him the title-deeds of the property.

Philip Henry Ball was never admitted tenant of the manor

JOYCE J. 1902 HOUNSELL v. DUNNING.

in respect of the copyholds, but on May 15, 1871, a deed of enfranchisement was executed in his favour by the lords of the manor in consideration of 138*l.* expressed to be paid by him. That deed recited that Philip Henry Ball inherited the said property "under the custom of the said manor as heir-at-law of his father Henry Hine Ball who died intestate, and of his mother Jemima Ball, also deceased, who also died intestate, as to the customary or copyhold estates she inherited from her husband Henry Hine Ball." This enfranchisement was procured by G. C. Hounsell, and the said sum of 138*l.* was in fact paid by him out of the rents of the copyholds or other property belonging to Philip Henry Ball.

Philip Henry Ball remained in possession of the property until his death on November 27, 1890. By his will, dated February 6, 1890, he appointed the defendants to be his executors and trustees, and gave all his real estate to them upon trust for sale, and to hold the proceeds of sale upon trust for his nephew and niece, the son and daughter of the plaintiffs.

The real facts as to the devolution of the copyholds upon the death of Henry Hine Ball having been discovered, this action was brought on September 25, 1900, by the plaintiffs, Mary Hounsell and her husband George Collins Hounsell in her right, claiming—

(1.) A declaration that on the construction of the will an undivided moiety of the copyholds in question was devised to the plaintiff Mary Hounsell;

(2.) A declaration that Mary Hounsell, or alternatively the plaintiffs, or alternatively the plaintiff G. C. Hounsell in right of his wife, was or were entitled to the undivided moiety of the said copyholds for a customary estate in fee simple; or

(3.) A declaration that the plaintiff Mary Hounsell was entitled to an estate in remainder in the said copyholds expectant on the death of her husband.

The defendants, among other defences, pleaded that the plaintiffs' claim was barred by the Statutes of Limitation.

Younger, K.C., and *Beddall*, for the plaintiffs. 1. This property passed to Mrs. Hounsell under the gift in the will of

Mrs. Jemima Ball of "all and singular the share and proportion of my late husband's estate I take or to which I am entitled on his decease," and there is nothing in the later provision to shew that the copyhold land there referred to was the copyhold land now in question.

The words of the gift are amply sufficient to pass this property, and they are not cut down by the subsequent provision in the will. Whatever the testatrix thought, it cannot affect the construction of the will: *O'Toole* v. *Browne* (1); *Sanderson* v. *Dobson*. (2)

It is true that a contrary view was taken of the same will in *Sanderson* v. *Dobson* (3); but, as appears from the report of *Dobson* v. *Bowness* (4), the two conflicting decisions were observed upon by Lord Campbell in *O'Toole* v. *Browne* (1), where he approved of the later decision. It also appears from the same report that a third case upon the same will was directed by Lord Langdale to the judges of the Court of Queen's Bench, but before any opinion was certified the case was compromised.

[JOYCE J. referred to *In re Bagot*. (5)]

That case is in favour of the plaintiffs on this point.

2. No question of election arises, because an erroneous belief on the part of the testatrix that certain property had passed in a particular way, even though she expressly declared that she made her will on the faith of it, will not raise an election. In *Box* v. *Barrett* (6) there was a clear mistake.

3. The sole remaining question is whether the plaintiffs are barred by the Statute of Limitations. Mr. Hounsell was in receipt of the rents and profits of this copyhold land from the death of Mrs. Ball in 1870 until 1877, when Philip Ball took possession, and since that date Philip Ball has continued in possession. It is immaterial what Hounsell did with the rents until Philip Ball came of age.

The question as to the effect of the statute turns upon what is the right of the husband in copyhold lands devised to his

(1) (1854) 3 E. & B. 572.
(2) (1849) 7 C. B. 81.
(3) (1847) 1 Ex. 141.
(4) (1868) L. R. 5 Eq. 404, 406.
(5) [1893] 3 Ch. 348.
(6) (1866) L. R. 3 Eq. 244.

JOYCE J. 1902 HOUNSELL v. DUNNING.

wife not for her separate use before the commencement of the Married Women's Property Act. In such a case the husband becomes the tenant of her copyhold lands during the coverture, and performs the services to the lord, but, being seised in right only of his wife without any secession from the tenancy, his admission is not requisite: Scriven on Copyholds, 5th ed. p. 204; 7th ed. p. 134. We say that Hounsell was in possession from 1870 to 1877 in right of his wife. Therefore the right of action first accrued in 1877, and the statute has run for twenty-three years prior to action brought. Mr. Hounsell is no doubt barred; but Mrs. Hounsell has been under disability during the whole period, and she is protected. By 3 & 4 Will. 4, c. 27, any person under the disabilities there mentioned, which include coverture, is allowed ten years next after the time at which the disability ceased (s. 16); provided that no action should be brought beyond forty years after the right of action first accrued (s. 17).

By the Real Property Limitation Act, 1874, these periods are reduced to six years and thirty years respectively (see ss. 3 and 5). That Act, however, did not come into operation until 1879, and we submit that this case is governed by the earlier Act; but whichever Act applies we are within the prescribed time. But, assume that the possession of Mr. Hounsell was not in right of his wife, then the right of action first accrued on the death of Mrs. Ball in 1870, and we submit that this case is governed by the earlier Act, and we are within the time prescribed by that Act.

Adams, for the defendants. Upon the question of construction I submit that these copyholds did not pass under the gift contained in the will of Jemima Ball.

Primâ facie, no doubt, the word "estate" will carry realty; but though it may be contended to have that effect, it does not necessarily follow that it must. The presumption in favour of its being so construed is greater in the case of a residuary gift than in that of a specific devise. A specific devisee must make out that the property was intended to pass: *Doe* v. *Hurrell* (1); *Coard* v. *Holderness*. (2) In *In re*

(1) (1821) 5 B. & Al. 18; 24 R. R. 265. (2) (1855) 20 Beav. 147.

Bagot (1) the gift was residuary. If it had been specific the decisions would have been different. (2) *O'Toole* v. *Browne* (3) and *Sanderson* v. *Dobson* (4) were both cases of residuary gifts. There is no difficulty where the gift is residuary. The difficulty only occurs in the case of a specific gift. There is no case which goes to that except *In re Bagot.* (1) [He also referred to *Green* v. *Pertwee.* (5)]

Upon the question of the Statute of Limitations, I say that the claim of the plaintiffs is barred in three ways, either of which is sufficient to entitle the defendants to have the action dismissed. (1.) The statute began to run against Jemima Ball from the day of her husband's death, it never having been shewn that she entered into possession. The plaintiffs claim under her, and, if the statute once began to run, no subsequent disability affects it: *Doe* v. *Jones* (6); *Murray* v. *Watkins* (7): see also Shelford's Real Property Statutes, 9th ed. p. 141. The burden of proof that Jemima Ball took possession is on the plaintiffs, as they must shew that their right first accrued within twelve years. That was admitted in argument by Serjeant Coleridge in *Doe* v. *Nepean.* (8) They have not shewn that she ever did take possession. Again, the plaintiffs themselves never acquired possession. The wife never had any right to do so, for the right was in the husband during coverture: Williams on Real Property (1885), 449; Scriven on Copyholds, 6th ed. (1882), 124; Watkins on Copyholds (1821), 425.

The husband, who had the right to receive the rents, never took possession on his own account. He received the rents as agent for and on behalf of Philip Ball. He was in possession as bailiff for an infant, and as such was bound to account: *Morgan* v. *Morgan* (9); *Thomas* v. *Thomas* (10); *Wall* v. *Stanwick* (11); *In re Hobbs.* (12) At any rate, the husband was the agent of Philip, and the possession of the agent is the

(1) [1893] 3 Ch. 348.
(2) Ibid. 357.
(3) 3 E. & B. 572.
(4) 1 Ex. 141.
(5) (1846) 5 Hare, 249.
(6) (1791) 4 T. R. 300; 2 R. R. 390.
(7) (1890) 62 L. T. 796.
(8) (1833) 5 B. & Ad. 86; 39 R. R. 411; 46 R. R. 789.
(9) (1737) 1 Atk. 489.
(10) (1855) 2 K. & J. 79.
(11) (1887) 34 Ch. D. 763.
(12) (1887) 36 Ch. D. 553.

JOYCE J. 1902 HOUNSELL v. DUNNING.

possession of the principal. That applies for the purposes of the Statute of Limitations even though the agent be the real owner: *Williams* v. *Pott* (1); Shelford's Real Property Statutes, 9th ed. p. 118. But then it may be said that the wife could not have disputed her husband's possession, in whatever capacity he acted, and, therefore, his acting as agent does not affect her right, she being a third party. *Williams* v. *Pott* (1), however, expressly shews that third parties are barred in such a case. It was the infant tenant in tail who was held barred, and not the agent. The result is that Jemima Ball never got possession, and the plaintiffs never did. Their right, therefore, was barred by s. 1 of the Real Property Limitation Act, 1874, twelve years from the death of H. H. Ball, and finally extinguished by s. 34 of the Act 3 & 4 Will. 4, c. 27. Secondly, if Jemima Ball got possession the plaintiffs never did. That being so, their right accrued on January 7, 1870, and after the lapse of thirty years from that time they were absolutely barred: 37 & 38 Vict. c. 57, s. 5. Thirdly, if the husband did get possession, still his action is barred, because he went out of possession admittedly not later than 1878, i.e., more than twelve years before action brought. He therefore is barred by s. 1 of the Act of 1874, and the wife cannot sue alone because she is under coverture: Daniell's Chancery Practice, 7th ed. p. 139. The result is that during the remainder of the coverture neither the husband nor the wife can sue; and if the husband survive eighteen years longer the wife will never be able to sue: Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 5. The question is, whose action this is, the husband's or the wife's. I say it is his. He was the only person who could make an entry or distress. The action spoken of in s. 1 of 37 & 38 Vict. c. 57 is an action by the person entitled to the immediate possession, i.e., in this case the husband.

Further, I submit that there is no trust arising out of the enfranchisement: *Collard* v. *Hare*. (2) On all these grounds I submit that this action fails. [He also referred to *Doe* v. *Bramston* (3); *Jumpsen* v. *Pitchers*. (4)]

(1) (1871) L. R. 12 Eq. 149.
(2) (1831) 2 Russ. & My. 675.
(3) (1835) 3 Ad. & E. 63; 42 R. R. 325.
(4) (1843) 13 Sim. 327.

Younger, *K.C.*, in reply. Upon construction these copyholds pass under the gift unless it can be shewn from other provisions in the will that they do not. In *Doe* v. *Hurrell* (1) and *Coard* v. *Holderness* (2) there was much to shew that the testator used the word "estate" as applying to personalty only.

Upon the statute, it is immaterial to consider whether time commenced to run from the death of H. H. Ball or from that of Jemima Ball. At the death of Jemima, Hounsell entered into possession in right of his wife, and while that possession lasted no statute could run against the wife. The fact that Hounsell accounted to Philip for the rents did not affect Mrs. Hounsell. She could not control the application of the rents. She was only interested in her husband's being in possession. In *Williams* v. *Pott* (3) the agent was himself the owner, and, of course, could create an estate against himself. A third person cannot be affected. It cannot be said that the acknowledgment by Hounsell of the title of another can have a greater effect than a complete assignment by him. If he had done that, *Jumpsen* v. *Pitchers* (4) shews that the interest of the wife would not have been affected. It is said that the wife has no remedy during her husband's life; but see *Glover* v. *Weedon*. (5)

JOYCE J. (after stating the facts). In my opinion, after some consideration, it is not material at all whether, upon the death of Jemima Ball, Philip Ball was of age and Hounsell received and accounted to him for the rents, or whether (as was the fact) Philip was an infant, and Mr. Hounsell collected the rents on his behalf and accounted for them as, what used to be called, the bailiff of an infant. He did, in fact, account to Philip for all the rents, he admitted him to be entitled, and procured the enfranchisement in his favour, and no one supposed that anybody else was entitled. The result of this, to my mind, is that Philip was in possession or receipt of the rents of this property at least from the death of Jemima Ball, if not from the death of Henry Hine Ball. This would

(1) 5 B. & Al. 18; 24 R. R. 265.
(2) 20 Beav. 147.
(3) L.R. 12 Eq. 149.
(4) 13 Sim. 327.
(5) (1857) 3 Jur. (N.S.) 903.

JOYCE J. 1902 HOUNSELL v. DUNNING.

clearly have been so if Mr. Hounsell were the real owner; and I think it is equally so although Mr. Hounsell was only entitled to the rents in right of his wife, there being no fraud or collusion in the case. If I am right in this, both the plaintiffs are, as I hold them to be, barred from any claim against this property by ss. 3, 5 of the Real Property Limitation Act, 1874, more than thirty years having elapsed between the date of the death of Jemima on January 7, 1870, and the commencement of this action on September 25, 1900.

Now, it has been said that this might have been so if Mr. Hounsell had not been the husband of Mrs. Hounsell, the real owner, or, rather, one of the real owners, and it is contended that Philip was in under Mr. Hounsell, so to speak, and that Philip cannot be in a better position than he would have been in if Mr. Hounsell had assigned or conveyed his life estate or his interest in these copyholds to Philip. To my mind, if that were so, this action equally fails, because these plaintiffs have no right which I can recognise or deal with until the termination of the coverture. It then might be a question of a different party altogether—the heir; but, as I say, I am of opinion, and I hold, that both the plaintiffs are altogether barred from any claim against this property.

Even if they were not barred by the statute, in order to succeed they must shew that they have a good title under a very peculiar devise or gift in the will of Jemima Ball. As I said, Mr. and Mrs. Hounsell are claiming in the right of the wife as a devisee under that will. [His Lordship referred to the terms of the will, and continued:—] Now on the facts, as to which there is really no dispute, I am satisfied that Mrs. Jemima Ball had not the slightest idea that she had any interest in the real estate in question, and that she never contemplated for one moment or thought that in making this gift she was passing any interest whatever in this copyhold estate. In my opinion this gift is ambiguous, and it may or may not be construed to pass the interest of the testatrix in the real estate in question. When we look at the context, we find that she gives as a reason for the mode in which she disposes of this share and proportion of her late

husband's estate to her daughters as she does, the fact that the copyhold estates of her husband devolved upon the eldest son Philip. So that to my mind there are upon the face of this will reasons inducing the Court to infer, not only that the testatrix did not intend that this real estate, if it was hers, should pass by this gift, but there is almost enough to shew that she intended it not to pass. At any rate, I am inclined to say that there is sufficient to induce the Court to hold that the testatrix, if she had known that there was a possibility of this property passing by the gift in question, would have made a different disposition of the property. Therefore, although it is not necessary for me to decide the question, I am inclined to think that this lady's interest in this property did not pass by this gift, but devolved upon her customary heir, namely, this same Philip Henry Ball, and I think that the view which was in fact taken of the law by the solicitor of the lord at the time of the enfranchisement was right when he said that P. H. Ball was entitled to the property he had inherited as heir-at-law of his father and of his mother Jemima Ball.

In any view of the case, if I am right, this action fails and must be dismissed with costs.

Solicitors for plaintiffs: *Pakeman & Read.*

Solicitors for defendants: *Surr, Gribble & Oliver, for Easton & Channer, Taunton.*

G. A. S.

JOYCE J.

1902

Jan. 13, 14, 15, 16, 20.

IRELAND *v.* HART.

[1901 I. 2064.]

Company—Shares—Transfer—Registration—Transfer in blank—Equitable Mortgage of Shares—Notice—Priority.

On March 4, 1901, I. executed to the defendant H. as security for a loan a transfer in blank of certain shares in a company, which were registered in his name, but which he held as trustee for his wife, the plaintiff. H. had no notice of the plaintiff's title to the shares. On November 23, 1901, H., having filled up the blank transfer in his own name, left it, together with the certificate, at the company's offices for registration. On November 26 the managing director of the company had an interview with I. with reference to the transfer, the amount of the consideration, as filled in, not appearing to be the full value of the shares, and I. informed him that H. was not entitled to have the shares registered in his name, and requested the company to delay registration. On November 27 the directors held a meeting at which the managing director stated what had occurred between I. and himself. The transfer was not formally before the meeting, no resolution was passed with reference to it, and it was not registered. On the same day the plaintiff brought an action against H. and I. and the company, claiming the shares, and obtained an interim injunction restraining the transfer. The company were not served with the writ until after the meeting of the 27th, and they had had no previous notice of the plaintiff's title.

Upon the trial of the action:—

Held, on the authority of *Société Générale de Paris* v. *Walker*, (1885) 11 App. Cas. 20, and *Moore* v. *North Western Bank*, [1891] 2 Ch. 599, that on November 27 H. had not a present absolute unconditional right to registration, and, consequently, that he had not acquired a legal title to the shares, and the plaintiff's prior equitable title must prevail.

TRIAL OF ACTION.

The plaintiff, Mrs. Lucy Ireland, claimed (1.) a declaration that 180 fully paid shares of 5*l.* each in the defendant company, Samuel Kidd & Co., which stood registered in the name of her husband, the defendant Henry Cubitt Ireland, were held by him in trust for her; (2.) an injunction to restrain the defendant G. J. Hart from procuring or attempting to procure the registration of a certain transfer of the shares to him, and from dealing with the certificate of the shares, or parting with the same except to the plaintiff, and to restrain the defendant company from registering any transfer of the shares except to

the plaintiff; and (3.) to have the said transfer delivered up to be cancelled, and to have the certificate of the shares delivered to the plaintiff.

The plaintiff was, at the time of her marriage to the defendant H. C. Ireland in 1892, entitled in her own right to the shares in question. In February, 1901, she transferred them to her husband, who was a solicitor, for the purpose of enabling him to attend and vote at meetings of the company in her behalf, and he was duly registered by the company as the holder of the shares.

Early in 1901 the defendant Ireland, being in financial difficulties, obtained a loan of 500*l.* from the defendant Hart, who was an accountant and had frequently audited his accounts and kept his books, and, as part security for the money so borrowed he, without the knowledge or consent of the plaintiff, on March 4, 1901, executed a blank transfer of the shares, and handed the same to the defendant Hart together with the certificate thereof.

The transfer was in the form of a deed under seal. There was a conflict of evidence as to whether the defendant Hart knew, when he took the transfer, that the shares really belonged to the plaintiff. The defendant Ireland alleged, on the one hand, that he had told Hart that the shares were his wife's, and that it was agreed between them that the transfer should not be used, but merely held until the loan was repaid.

The defendant Hart, on the other hand, alleged that he knew of no trust of the shares, and had given good consideration for the transfer. He denied that there was any understanding between himself and the defendant Ireland that nothing was to be done with the shares without a mutual arrangement, but stated that it was agreed that they should not be disposed of without giving the defendant Ireland an opportunity of redeeming them.

Previously to November 23, 1901, the defendant Hart, not being satisfied with his security, filled up the blanks in the transfer by inserting his own name as the transferee, and putting in the sum of 100*l.* as the consideration for the transfer. He also executed the transfer, and on November 23, 1901, sent

JOYCE J. 1902 IRELAND v. HART.

it, together with the certificate for the shares, to the office of the defendant company for registration.

On November 26 Mr. Wright, the managing director of the defendant company, called upon the defendant Ireland with reference to the transfer, pointing out that the amount of the consideration as therein expressed was much below the real value of the shares. At that interview the defendant Ireland told Mr. Wright that the defendant Hart had no right to have the shares registered in his name, and asked that registration might be postponed for a few days. On the same day he embodied the request in a letter which he addressed to Mr. Wright at the company's office. The next meeting of the directors of the defendant company was held on November 27, when Mr. Wright told the directors what had taken place between him and the defendant Hart. The transfer was not formally brought before the board, and no resolution with reference to it was passed. On the same day the writ in this action was issued, and an interim order was made upon the ex parte application of the plaintiff restraining the defendant Hart from procuring or attempting to procure the registration of the transfer; restraining the defendants Hart and Ireland from transferring the shares or dealing with the certificate of the same; and restraining the defendant company from registering any transfer of the shares except to the plaintiff. The action was subsequently ordered to be set down for trial without pleadings, and now came on for hearing.

Art. 30 of the company's articles of association provided as follows: "The instrument of transfer of any share shall be signed both by the transferor and the transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof."

Art. 31 provided that "The instrument of transfer of any share shall be in writing in the usual common form, or in the following form, or as near thereto as circumstances will admit." Then followed a form of transfer which was substantially the same as that given in Table A to the 1st schedule of the Companies Act, 1862.

Art. 33 was as follows: "Every instrument of transfer shall be left at the office for registration, accompanied by the certificate of the shares to be transferred, and such other evidence as the company may require to prove the title of the transferor or his right to transfer the shares."

Hughes, K.C., and *C. T. Mitchell*, for the plaintiff. The defendant Hart had notice of the trust in this case. At all events he was put upon inquiry, as he must have known that these shares were not property with which the defendant Ireland was in a position to deal.

Again, the transfer, if it be regarded as a deed, was rendered void by the subsequent alteration or filling in. It did not pass the legal title to the shares, and the equitable title of Hart must be postponed to the prior equitable title of the plaintiff: *Powell* v. *London and Provincial Bank*. (1)

Registration was necessary in order to complete the legal title to the shares. Here there has been no registration, and by art. 30 of the company's articles the defendant Ireland is still the holder.

Nor had the defendant Hart as between himself and the company an "absolute unconditional right" to be registered as the shareholder: *Société Générale de Paris* v. *Walker* (2); *Roots* v. *Williamson* (3)

Moreover, we say that the defendant Hart took the transfer with notice of the trust in favour of the plaintiff, and in such a case, whether the notice be actual or constructive, he cannot claim the shares as against her: *Earl of Sheffield* v. *London Joint Stock Bank* (4); see also Lewin on Trusts, 10th ed. 1045.

Sydney C. N. Goodman, for the defendant Hart. Hart took the share transfer and certificates from Ireland as security for his loan bonâ fide, and without notice of the plaintiff's title.

The transfer under seal was valid, although the articles provide that transfers shall be in writing in the usual common form; and Hart had authority to fill in the blanks: *Ex parte Sargent* (5); Buckley on the Companies Acts, 7th ed. p. 488.

(1) [1893] 1 Ch. 611; [1893] 2 Ch. 555.
(2) 11 App. Cas. 20.
(3) (1888) 38 Ch. D. 485.
(4) (1888) 13 App. Cas. 333.
(5) (1874) L. R. 17 Eq. 273.

JOYCE J. 1902 IRELAND v. HART.

After so filling up the transfer and delivering it with the certificates to the company for registration, Hart had a good legal title to the shares, which must prevail over the plaintiff's prior equitable title.

Upon the articles the directors had no power to refuse registration in the circumstances. In the cases cited on behalf of the plaintiff important requisites were omitted. If a transferee shews a clear right to have his name put on the register, the Court will ministerially exercise the power of putting him on: *Ex parte Sargent.* (1) In *Société Générale de Paris* v. *Walker* (2) the transfer was not accompanied by the certificates, and the decision turned upon that; but in that case Lord Selborne would have decided the other way if all necessary conditions had been fulfilled to give the transferee as between himself and the company a present absolute unconditional right to have the transfer registered. In a later part of his judgment he repeats the phrase with the omission of the word "present." But, taking the phrase most against me, I say that Hart has acquired a present absolute unconditional right to registration. The company would have been under no liability to the plaintiff if upon the production of the certificates they had registered the transfer.

[JOYCE J. Suppose the company had notice that the transfer was a fraud?]

That question is not material to the present case; but I submit that even in that case the company could not have refused registration. In point of fact, the company based their refusal upon the amount of the consideration; but that is certainly not a ground for withholding registration. *Moore* v. *North Western Bank* (3) is distinguishable from the present case, because by the articles in that case the right of transfer was only to persons approved by the directors; but the test given in that case is, Had the transferee, before the company had notice of a better title, complied with all the necessary formalities, so that nothing more remained to be done but the purely ministerial act of putting the transfer on the register? In

(1) L. R. 17 Eq. 273. (2) 11 App. Cas. 20.
(3) [1891] 2 Ch. 599.

Nanney v. *Morgan* (1) it was laid down by Cotton L.J. (2) that the mere neglect of the company to register would not affect the right of the transferee to be treated as the legal owner.

[JOYCE J. That was under the Companies Clauses Act, 1845.]

There is no material difference for this purpose between that Act and the Companies Act, 1862. In *Roots* v. *Williamson* (3) the necessary formalities had not been complied with so as to give the transferee an unconditional right to registration. The plaintiff, even if she has a prior equitable title, is precluded from setting it up by her negligence in allowing her husband's name to remain on the register for a year after the object of the transfer to him was fulfilled: *Shropshire Union Railways and Canal Co.* v. *Reg.* (4) The title of the defendant Hart, though posterior in point of time, should prevail.

Mitchell, in reply. The priority of assignees of shares in a company governed by the Companies Acts must be determined, cæteris paribus, by the priority of assignment: Lindley on Companies, bk. 3, ch. 4, s. 1. The entry on the register is essential to constitute membership of the company: *Nicol's Case* (5); Companies Act, 1862, s. 23. If an application had been made by Hart on November 27 to rectify the register under s. 35 of the Act of 1862 it would not have been successful. There has been no default and no delay on the part of the company: *Shepherd's Case.* (6) [He also referred to *Suffell* v. *Bank of England.* (7)]

The defendant Ireland did not defend the action, and the defendant company were not represented by counsel, but submitted to be bound by the order of the Court.

Cur. adv. vult.

Jan. 20. JOYCE J. (after stating the facts). The transfer in question appears to have been executed by Ireland under seal. I take it that upon the authority of *Ex parte Sargent* (8) the transfer is good, although the articles of association do not

(1) (1887) 37 Ch. D. 346.
(2) Ibid. 354.
(3) 38 Ch. D. 485.
(4) (1875) L. R. 7 H. L. 496.
(5) (1885) 29 Ch. D. 421.
(6) (1866) L. R. 2 Eq. 564; 2 Ch. 16.
(7) (1882) 9 Q. B. D. 555.
(8) L. R. 17 Eq. 273.

JOYCE J. 1902 IRELAND v. HART.

require a transfer to be by deed, and I consider that the defendant Hart had authority to fill up the blanks and to complete the transfer.

There appears to have been some conversation between the parties as to not registering the transfer, or at all events not disposing of the shares without Mr. Ireland being informed and given an opportunity to redeem, or something of that kind. On November 18, 1901, Mr. Hart, having reason to doubt the goodness of his security, or the position of Ireland, in order to protect himself, filled up the transfer, and on November 23 he sent it for registration to the company's office, and a formal receipt was given for it. In my opinion, Mr. Hart had authority to fill up the transfer and to do what he did.

Now, the next ordinary meeting of the directors of the company was held on Wednesday, November 27. On Tuesday, the 26th, Mr. Wright, the managing director, called on Mr. Ireland in consequence of an objection taken by the company that the consideration of 100*l.*, as filled in by the defendant, was insufficient, when, as I understand, Mr. Ireland told Mr. Wright that the defendant Hart had no right to transfer the shares, and he asked that the registration of the transfer might be postponed for a time. Mr. Wright appears to have agreed to that; and on the same day Mr. Ireland addressed a letter to Mr. Wright at the company's offices requesting that the registration of the transfer might be delayed for a few days. At the meeting on the 27th Mr. Wright told the directors what had taken place. No resolution at all was come to; but, as I understand, the directors raised no objection to what had been done. In point of fact, the transfer was not formally submitted to the board. On the same day the action was commenced, and an interim injunction was granted, of which the company had formal notice the next morning.

Now, in my opinion, the directors were not bound to register that transfer at the meeting on the 27th. It is well settled that, although directors may have no power to refuse to register a transfer, they are entitled to have a reasonable time after the transfer is made in order to make inquiries for the purpose of finding out if the transfer is in order; but, after being satisfied on this point, they are bound at the next meeting to register

the transfer. But I consider that, after what had taken place in this case, the directors were not bound to pass the transfer at the meeting on the 27th. At all events, they did not then pass the transfer. In my opinion, if an application had been made under s. 35 of the Companies Act, 1862, on November 27 to rectify the register, it could not have succeeded.

It is established by *Société Générale de Paris* v. *Walker* (1), *Roots* v. *Williamson* (2), and *Moore* v. *North Western Bank* (3) that, where the articles are in the form in which they are in the present case, a legal title is not acquired as against an equitable owner before registration, or at all events until the date when the person seeking to register has a present absolute and unconditional right to have the transfer registered. I am not called upon to define the meaning of a "present absolute and unconditional right," but, as it appears to me, I am not sure that anything short of registration would do except under very special circumstances. At all events, I am of opinion that in this case, prior to the date of the injunction, the defendant Hart had not a "present absolute and unconditional right" to the registration of the transfer of these shares, and that the prior equitable right of the plaintiff, Mrs. Ireland, must prevail.

[His Lordship then held, upon the evidence, that the defendant Hart had no notice of the plaintiff's title, and said that, although the plaintiff's prior equitable title must prevail, yet under the circumstances he should make no order as to costs. There would be a declaration that the equitable title of the plaintiff prevailed over the claim of the defendant Hart, and that the transfer to him executed by the defendant Ireland was inoperative. There would also be an order upon the defendant Hart to deliver up the certificate of the shares to the plaintiff, and the plaintiff would have liberty to apply for delivery up of the transfer to be cancelled, and generally.]

Solicitors: *S. J. R. Stammers; S. A. Jones.*

(1) 11 App. Cas. 20. (2) 38 Ch. D. 485. (3) [1891] 2 Ch. 599.

G. A. S.

SWINFEN EADY J.

1902

Jan. 21.

GREENWELL *v.* PORTER.

[1901 G. 2482.]

Company—Shares—Agreement to Vote in a particular Way—Executors—Directors.

Executors holding shares in a company agreed to sell part of them to G., who stipulated that as part of the transaction he should nominate X. and W. as directors, and that the executors should, when either X. or W. should retire by rotation, vote for and not against his re-election. The agreement extended to shares whether held by the executors in that capacity or in their own personal capacity. W. was about to retire by rotation, and some of the executors threatened to oppose his re-election :—

Held, that the agreement was valid as regarded shares held by the executors either as such or as directors, and that on W. undertaking to retire, if required by the Court, at the ordinary meeting next after the trial, an injunction must be granted until the trial restraining such of the executors as threatened to do so from voting against the re-election of W. on his retirement by rotation.

Jane Porter, John Herbert Porter, Gerald Stanley Porter, and William Allan Miller, as executors and trustees of the will of James Porter, deceased, held a large number of preference and ordinary shares in a company called Robinson's Brewery, Limited. The shares formed part of the residuary estate of the testator which the trustees held upon trust for sale, with power to postpone the sale.

In 1898 the trustees were in want of money for the purposes of the estate, and they agreed to sell 5500 preference and 1000 ordinary shares in the company to Walpole Greenwell. As part of the consideration for the sale he stipulated for the agreement below mentioned.

The agreement was dated July 26, 1898, and was made between the four executors and trustees, thereinafter called "the executors" of the one part and Greenwell of the other part, and after recitals that the executors were the executors and trustees of James Porter's will, and as such the owners of or otherwise well entitled to certain large numbers of ordinary and preference shares in Robinson's Brewery, Limited, and

that Greenwell was "also largely interested in that company," it contained the following clauses :—

"(1.) The executors shall take all steps and do all things within their power which may be required for obtaining the election, as directors of Robinson's Brewery, Limited, of Aynsley Greenwell and Thomas Trevor White, and shall at all times hereinafter vote for and not against the re-election as directors of the said Aynsley Greenwell and Thomas Trevor White upon their retirement by rotation, so long as they shall be willing to remain directors of the company, unless in case of either of them, the said Aynsley Greenwell and Thomas Trevor White, the other four directors shall concur in his not being re-elected. The executors shall not at any time, except with such concurrence as aforesaid, vote for the removal of either of the said Aynsley Greenwell and Thomas Trevor White, and shall not, except with such concurrence as aforesaid, take any steps or do any acts to induce or compel them or either of them to relinquish their or his office of director, but shall at all times to the best of their ability, by their votes and otherwise, support them and each of them in their office. Each of them, the parties hereto of the first part, agrees that the provisions of this clause shall apply to him or her and to any shares now or at any time hereafter held by him or her in his or her own personal capacity, and not only as such executor and trustee as aforesaid.

"(2.) The executors shall sell to the said Thomas Trevor White, for his qualification as director, one hundred ordinary shares of the company at the price of 10*l.* per share, and shall sell to the said Walpole Greenwell (who shall purchase the same and shall qualify the said Aynsley Greenwell as a director) one thousand ordinary shares also at the price of 10*l.* per share."

Aynsley Greenwell and Trevor White were appointed directors, and the other directors were J. H. Porter, G. S. Porter, and W. A. Miller.

At the ordinary meeting of the company on December 20, 1901, it became the turn of Trevor White to retire from the directorate by rotation. His re-election was, however, moved and seconded, and on a show of hands there was a majority in

SWINFEN EADY J.
1902
GREENWELL v. PORTER.

favour of the motion. A great number of shares stood in the joint names of the executors, and, Jane Porter's name being the first on the register of shareholders, she was entitled to exercise the power of voting. They were also entitled in respect of shares which they held in their own separate names beneficially.

A poll was demanded by the number of shareholders required by the articles, the demand being signed by G. S. Porter, J. H. Porter, Jane Porter, and another shareholder.

It was not disputed that the three members of the Porter family intended on the poll to oppose the re-election of Trevor White as a director.

Aynsley Greenwell was absent abroad with the leave of the directors.

On December 24, 1901, Walpole Greenwell commenced an action against Jane Porter, J. H. Porter, G. S. Porter, and W. A. Miller, for (1.) "an injunction to restrain the defendants and each of them, their proxies and agents, from voting at the poll to be taken on January 28, 1902, or on any other date on which the same may be fixed pursuant to the demand for a poll made at the ordinary general meeting of Robinson's Brewery, Limited, held on December 20, 1901, against the resolution for the re-election of Thomas Trevor White as a director of Robinson's Brewery, Limited, or from otherwise voting contrary to the provisions of an agreement dated July 26, 1898, and made between the defendants of the one part and the plaintiff of the other part; (2.) in the alternative, and in any event, damages."

The four defendants were sued in their capacity as executors of James Porter, deceased, and the first three defendants were also sued in their individual capacity.

On January 6, 1902, the plaintiff served notice of motion for an interlocutory injunction in the terms of the indorsement of his writ of summons, and the motion was heard on January 21.

Warmington, K.C., *Vernon Smith, K.C.*, and *Whinney*, for the plaintiff. It is admitted that the proposed action on behalf of the first three defendants is contrary to the terms of

the agreement, and they say (1.) that in the interests of the company they are justified in departing from those terms, and (2.) that the agreement is invalid and cannot be enforced. The other defendant supports the plaintiff in this action, and says he will vote in favour of the re-election.

A share is property in respect of which the holder may exercise all his rights as he pleases. He need not consult the interest of the company, but may consult his own interest only: *North-West Transportation Co.* v. *Beatty* (1); *Pender* v. *Lushington*. (2) The right of voting is one of the incidents of the ownership of shares, and the shareholder may deal with that right as he pleases. The ordinary way is to transfer the shares and obtain a declaration of trust from the transferee, but there is no legal objection to shareholders agreeing to vote in a particular way. It is true that, as regards most of their shares, the defendants hold them as executors, but the agreement was part of an arrangement which was the best that could be made in the interest of the testator's estate.

Eve, K.C., and *Jessel*, for the first three defendants. The arrangement entered into was ultra vires the executors and a breach of trust on their part. They had no power to tie their hands as to the management of the testator's estate. Even if the arrangement resulted in the defendants obtaining a larger price for the shares sold, that result was brought about by unlawful means. Their duty was to realize the estate to the best advantage, and in the meantime to manage the estate including the shares in the company. The effect of the agreement is to delegate the power of managing part of the estate. It is like the case of a trustee for sale selling a part of the estate, possibly for a larger sum than could otherwise be obtained, but with an agreement not to exercise his discretion as to the unsold portion of the estate. As the defendants are executors, a transfer of the shares with a declaration of trust by the transferee would have been illegal.

[They cited in support of this part of the argument, *Oceanic Steam Navigation Co.* v. *Sutherberry*. (3)]

(1) (1887) 12 App. Cas. 589. (2) (1877) 6 Ch. D. 70.
(3) (1880) 16 Ch. D. 236.

SWINFEN EADY J.
1902
GREENWELL v. PORTER.

Some of the defendants are directors of the company, and, therefore, apart from being executors, stand in a fiduciary position to the company, and hold qualification shares in their own right. In respect of their privileges as regards those shares they are bound to consider only the interest of the company, and cannot fetter their voting rights in favour of some other person.

If the interlocutory injunction is granted, Trevor White will, under the articles, remain a director for three years, although before that time has expired it may be decided at the trial that the plaintiff's contention is wrong.

[They also referred to Lindley on Companies, 5th ed. p. 364.]

Ashton Cross, for the defendant Miller. Miller has always abided by the agreement, which was entered into for the benefit of the estate, and he has no intention of voting otherwise than as he has contracted to vote.

[SWINFEN EADY J. asked whether Trevor White would give an undertaking to retire from the directorate, and he, by the plaintiff's counsel, consented to give an undertaking that, if the Court at the trial should so direct, he would resign his seat on the board at the annual meeting next following the date of the trial, and then offer himself for re-election.]

SWINFEN EADY J. (after referring to the notice of motion). The plaintiff does not claim to compel the defendants to vote pursuant to the agreement, but he asks for an injunction restraining them from voting contrary to the provisions of the agreement. [His Lordship read the material parts of the agreement, and continued:—]

The plaintiff has brought this action to enforce the agreement so far as regards the provision as to voting. The agreement was entered into as part of a transaction under which the defendant executors sold to the plaintiff for a large price a considerable block of shares, and it appears from the evidence that it was at the time considered by all parties, and certainly by the executors, that it was to the interest of their testator's estate that the block of shares should be sold, that the terms were advantageous, and that at that time it was to the interest of

the estate that the money should be obtained by a sale of shares in the way the transaction was carried into effect. The plaintiff stipulated as part of the transaction that he should have the benefit of the agreement.

Three of the defendant executors seek now to escape from performing the agreement. They say, in the first place, that the agreement was ultra vires—that as executors they had no power to, what they term, delegate their discretion as executors. At the present moment I am not satisfied that that point has any validity whatever. It will be observed that the sale of the shares retained by the executors is not tied up. It is only in consideration of the plaintiff purchasing a certain block of shares that the executors agree with him that so long as they hold certain shares they will vote in a particular way, and will not vote in a particular other way. The realization of the estate vested in them as executors is not agreed to be postponed with regard to these shares, and the executors do not bind themselves not to part with the whole of the shares next day. On the facts as they are at present before me, I am of opinion that the arrangement embodied in the agreement was for the benefit of the executors and their estate, and that it was not beyond the powers of the executors to enter into it.

The next point made was that, so far as regards shares held by any of the defendants in their individual capacity, because they were directors they could not enter into an agreement with regard to their voting in respect of these shares; and that, although an ordinary shareholder might do so, still, if the shareholder happened to be a director, that fact precluded him from entering into such an agreement. No authority was produced for such a proposition, and I do not consider it well founded.

Then it was said—and upon this I was pressed by Mr. Eve—that the effect of granting an injunction to restrain the defendants from voting against the reappointment would be that Mr. Trevor White would be in the position of a director of the company for three years, even although it should turn out that the plaintiff should fail at the trial. It was to prevent

SWINFEN EADY J.

1902

GREENWELL v. PORTER.

that, which apparently might create or give rise to some injustice, that I endeavoured to see whether any undertaking could be given to meet the point. That point is now covered by the undertaking which Mr. Vernon Smith was instructed to give on behalf of Mr. Trevor White, who is not a party to the action, but is in court. Therefore the undertaking will be entered in the registrar's book, and Mr. Trevor White will sign the book.

That undertaking being given, I grant an injunction until the trial of the action restraining the first three defendants from voting against the resolution for the re-election of Mr. Trevor White as a director.

Solicitors for plaintiff: *Markby, Stewart & Co.*

Solicitors for defendant Miller: *Gibson & Weldon, for F. W. Richardson, Burton-on-Trent.*

Solicitors for other defendants: *M'Diarmid & Hill.*

F. E.

SWINFEN EADY J.

1902

Jan. 14, 15, 25.

In re HILL.
HILL *v.* HILL.

[1901 H. 2413.]

Will—Construction—Heirlooms—Dignity—Period of Absolute Vesting—Perpetuity.

A testatrix bequeathed jewels and miniatures to her son, Viscount Hill (who survived her), until he should die, and after his death to the persons who should in turn succeed to the title; her "intention being that the said diamonds, miniatures, and ring shall descend as heirlooms as far as the rules of law and equity will permit":—

Held, that, on the death of Viscount Hill, the son of the testatrix, his successor to the viscounty became absolutely entitled to the jewels and miniatures.

THIS was an originating summons in the matter of the trusts of the will of Ann, Dowager Viscountess Hill, dated May 28, 1891, and of the Settled Land Acts, 1882 to 1890, for the determination of the question whether the plaintiff, Viscount Hill (1), was entitled absolutely, or for life only, or otherwise to certain diamonds, consisting of a tiara, necklace, pendant, and earrings, and to other chattels bequeathed by the will to descend as heirlooms with the title and dignity of Viscount Hill.

The late Ann, Dowager Viscountess Hill, by her will, dated May 28, 1891, appointed the defendants Fanny Melita Kynnersley and Lewis John Berger executors and trustees, and the will contained the following bequest: "I bequeath my diamonds, consisting of a tiara, necklace, pendant, and earrings, and my two miniatures of Sir Rowland Hill and Miss Hill, which are mounted in velvet as bracelets, and my small ring set with rubies, which was given by the Pretender to Sir Richard Hill, to my son the Right Hon. Rowland Clegg Viscount Hill, until he shall die, and after his death to each and every

(1) The Viscounty Hill was created by patent dated 1842 in favour of General Lord Hill, with remainder to the issue male of his deceased brother John. The first Viscount died without having been married in December, 1842, and was succeeded by his nephew Rowland, the husband of the testatrix.

SWINFEN EADY J.

1902

HILL, *In re.* HILL *v.* HILL.

of the persons who shall in turn succeed to the title and dignity of Viscount Hill, or any other title or dignity which may be granted to or assumed by any person for the time being entitled to the said title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit."

The testatrix died on October 31, 1891, and her will has been duly proved. Her son Rowland Clegg, third Viscount Hill, survived his mother, and entered into possession of the said chattels. He died on March 30, 1895, and was succeeded in the title by his son, the plaintiff Rowland Richard Clegg, fourth Viscount Hill, who was born in the year 1863. The plaintiff was married, but had not any issue. The heir-presumptive to the title was the plaintiff's brother, the defendant Francis William Clegg Clegg Hill, who was born in the year 1866, and is unmarried.

The plaintiff shortly after the death of his father took proceedings to recover a portion of the said chattels from his stepmother Isabella Elizabeth, Dowager Viscountess Hill, who claimed the same on the ground of their having been subject in the hands of the testatrix to an alleged precatory trust. The decision of the Court of Appeal established that the chattels were not subject to any precatory trust, and the result of that litigation was that it was determined that the testatrix had power to dispose of them by her will: *Hill* v. *Hill.* (1)

Errington, for the plaintiff Viscount Hill. I admit that the testatrix could, if she had used fit words, have tied up the chattels in question so as to make them go with the dignity till twenty-one years after the death of definite persons in existence at her death; but she did not do so here. The expression of an intention that the chattels should go as heirlooms so far as the rules of law and equity will permit is not enough; she has simply given a life interest, and then has tried to bequeath an estate tail in chattels, which gives an absolute interest to the first intended tenant in tail after the

(1) [1897] 1 Q. B. 483.

tenancy for life: *Tollemache* v. *Earl of Coventry*. (1) Lord St. Leonards does criticise this case, but he was constrained to follow it: *Ker* v. *Lord Dungannon* (2); and the principle has always been recognised: *In re Viscount Exmouth* (3); *In re Johnston* (4); *Hill* v. *Hill* (5); *Vaughan* v. *Burslem* (6); *Mackworth* v. *Hinxman*. (7)

Brinton, for the defendant. The testatrix expressed an intention to tie up the devolution of the chattels in question, so far as the rules of law and equity permit, so as to make them go with the title. It is lawful to tie up chattels for a time to go either with an estate or, otherwise, as for instance with a dignity: *Shelley* v. *Shelley*. (8) The only question is whether and to what extent the testatrix has done so. Her language is sufficient to create an executory trust: *Shelley* v. *Shelley*. (8) The effect of the words she has used is to tie the chattels up, if not for the period of the lives of a class of her male descendants in being at her death and twenty-one years afterwards, at least for the period of twenty-one years after her own death, so that the chattels would become the absolute property of the person who should be Viscount Hill at the expiration of that period. This I submit, notwithstanding what was said in *Tollemache* v. *Earl of Coventry* (1), which has been disapproved by Lord Sugden and others: Sugden's Law of Property, pp. 336, 338; *Montague* v. *Lord Inchiquin* (9); *In re Johnston* (4); *Countess of Harrington* v. *Earl of Harrington* (10); Theobald on Wills, 5th ed. 529.

If my contention fails, the words of the will shew an intention to create a perpetuity, and the whole gift fails. The chattels fall into the residue and come to my client as residuary legatee: *Countess of Harrington* v. *Earl of Harrington* (11), per Lord Cairns.

Errington, in reply.

(1) (1834) 2 Cl. & F. 611; 37 R. R. 260.
(2) (1841) 1 D. & War. 509, 536.
(3) (1883) 23 Ch. D. 158.
(4) (1884) 26 Ch. D. 538.
(5) [1897] 1 Q. B. 483.
(6) (1790) 3 Bro. C. C. 101.
(7) (1836) 2 Keen, 658; 44 R. R. 309.
(8) (1868) L. R. 6 Eq. 540.
(9) (1875) 23 W. R. 592.
(10) (1871) L. R. 5 H. L. 87.
(11) Ibid. 106.

SWINFEN EADY J.
1902
HILL, *In re.*
HILL *v.* HILL.

Jan. 25. SWINFEN EADY J. (after stating the facts as above). The nature and extent of the interest taken by the plaintiff, under the will of his grandmother, the testatrix, did not arise in those proceedings, and has now to be determined. It is not disputed that under the will the son of the testatrix —namely, the third Viscount Hill—was entitled to possession of the chattels during his life. Upon his decease, the plaintiff contends that the chattels vested absolutely and indefeasibly in himself. The defendant F. W. C. Clegg Hill contends that the chattels do not vest absolutely in the plaintiff, but that upon his death within twenty-one years after the death of the testatrix they will pass and belong to the next Viscount Hill, subject in turn to be similarly divested in favour of the next succeeding Viscount, if he succeeds to the title within the said period of twenty-one years; and that the person who is Viscount Hill at the expiration of the said period of twenty-one years will become indefeasibly entitled to the said chattels. The defendant founds this contention on the clause in the will of the testatrix bequeathing the chattels to each and every of the persons who should in turn succeed to the title and dignity of Viscount Hill, severally and successively as they should in turn succeed to the title, her intention being that the chattels should descend as heirlooms so far as the rules of law and equity will permit.

It is clear that, subject to the rule against perpetuities, chattels may be settled to follow the devolution of a dignity: *In re Johnston* (1); *Hill* v. *Hill*. (2) I have, however, to consider whether, in the present case, the articles have been effectually settled in the manner contended for by the defendant F. W. C. Clegg Hill, and whether the words which I have read are sufficient to create an executory trust and cut down the interest taken by the plaintiff to a defeasible interest, in the event of his dying within the period of twenty-one years from the death of the testatrix. That the mere addition of the words, "so far as the rules of law and equity will permit" will not make the trust executory, or amount to a direction to settle, appears from *Lord Scars-*

(1) 26 Ch. D. 538, 548. (2) [1897] 1 Q. B. 490.

dale v. *Curzon*. (1) In *Shelley* v. *Shelley* (2) the testatrix gave certain jewellery "to my nephew John Shelley, to go and be held as heirlooms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit." I stop there, omitting the subsequent direction in that will, because there is nothing equivalent to it in the present case. Wood V.-C. held in substance that the words which I have read, if they had stood alone and unqualified by the subsequent direction, would have created an absolute interest in the nephew John.

Again, in *In re Viscount Exmouth* (3) the facts were that the second Viscount Exmouth bequeathed to trustees certain plate, jewels, and other chattels, "upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will permit, by the person who for the time being shall be actually possessed of the said title, in the nature of heirlooms." There followed in that case other words to which there is nothing equivalent in the present case. In dealing with the portion of the gift which I have read, Fry J. said (4): "There can, in my judgment, be no doubt that the effect of that clause, standing alone, would be to give an absolute interest in the chattels to the first person who succeeded to the honours, and that, therefore, if it had stood alone, the third Viscount would have become absolutely possessed of these chattels. That, I think, follows from the case of *Tollemache* v. *Earl of Coventry*." (5)

In the case of *Countess of Harrington* v. *Earl of Harrington* (6) Lord Westbury pointed out (7) that in the case of a direct gift of chattels, upon trusts corresponding with the ownership of real estate, up to the limit of time allowed by the law against perpetuities, it is settled that, so soon as the real estates (to which the personal chattels are thus made accessory)

(1) (1859) 1 J. & H. 40, 50.
(2) L. R. 6 Eq. 540.
(3) 23 Ch. D. 158.
(4) 23 Ch. D. 162.
(5) 2 Cl. & F. 611; 37 R. R. 260.
(6) L. R. 5 H. L. 87.
(7) L. R. 5 H. L. 101.

SWINFEN EADY J.

1902

HILL, *In re.* HILL *v.* HILL.

vest in a tenant in tail in possession, the transmissibility of the personal estate ceases, although the time allowed by the rule against perpetuities has not expired, and the personal chattels become the absolute property of the tenant in tail in possession, although he may be an infant, and may afterwards die without having attained majority. To meet the difficulty of the chattels becoming severed from the real estate by reason of the death of an infant tenant in tail, it is usual to impose a condition that the heirlooms shall not vest absolutely in any tenant in tail unless he shall attain twenty-one. In the same case Lord Cairns pointed out (1) that none of the authorities (except Lord Hardwicke, whose views had not been followed) had doubted, but that, indeed, all had assumed, that a general trust of chattels to go with settled estates, or to be held by persons for the time being entitled to the possession of settled estates, as long as the rules of law and equity would permit, would be effectual, and effectual by means of those particular words, to carry the chattels to the first person with an estate of inheritance, but that the doctrine of the same authorities was that the Court of Equity could not further protect the chattels if that person died under twenty-one, and if the instrument of settlement did not contain any valid clause of defeasance in that event. In my judgment, a similar rule applies where chattels are settled to follow the devolution of a dignity, and to descend as heirlooms so far as the rules of law and equity will permit, and in the absence of any clause of defeasance in the instrument of settlement, they will vest absolutely in the first person upon whom the dignity devolves, upon the decease of any person or persons to whom limited interests in the chattels are expressly given.

In the present case, upon the decease of the third Viscount Hill, to whom the chattels were given for his life, or until his death, the chattels passed absolutely to the fourth Viscount, and I make a declaration accordingly.

Solicitors: *Upperton & Co.; Chester & Co., for Lucas & Salt, Wem.*

(1) L. R. 5 H. L. 107.

D. P.

In re FERNELEY'S TRUSTS.

SWINFEN EADY J.

1902

Feb. 1.

[1901 F. 2272.]

Married Woman—Restraint on Anticipation—Rule against Perpetuities—Severance of Class.

A restraint on anticipation, imposed by a general clause in a will upon all the shares of daughters of the testator's children, is good as to the shares of those members of the class who are born in the testator's lifetime, though void as to the shares of those born afterwards.

Herbert v. *Webster*, (1880) 15 Ch. D. 610, followed.

In re Michael's Trusts, (1877) 46 L. J. (Ch.) 651; *In re Ridley*, (1879) 11 Ch. D. 645, not followed.

GEORGE FERNELEY, the testator in this matter, by his will dated February 8, 1844, gave his residuary real and personal estate to trustees, upon trust for sale and conversion, and to divide the proceeds into four equal parts or shares; and as to one-fourth part or share upon trust to pay thereout 1000*l.* to his daughter Betsy, the wife of Thomas Cockerill Wrigley, for her separate use, and to invest the remainder as therein mentioned, and during the natural life of his said daughter to pay the income thereof unto such person or persons as his said daughter should, but not by way of anticipation, appoint, and in default of and subject to such appointment, into her own proper hands; and from and after the decease of his said daughter Betsy the testator directed that his trustees should stand possessed of the last mentioned trust moneys, and the funds and securities on which the same should be then invested, upon trust for all and every the child and children of his said daughter Betsy Wrigley who should attain the age of twenty-one years or be married, equally to be divided between them if more than one. And as to one other fourth part or share upon trust to pay thereout 1000*l.* to his daughter Esther, and as to the remainder thereof upon trust to invest the same in like manner and stand possessed of the investments and the dividends, interest, and annual income thereof upon such and the like trusts and with such and the like powers, restrictions,

SWINFEN EADY J.

1902

FERNELEY'S TRUSTS, *In re.*

and declarations in all respects, and particularly against anticipation, for the benefit of his daughter Esther and her children or child, as were thereinbefore expressed and declared of and concerning the remainder of the said first mentioned fourth part or share for the benefit of his said daughter Betsy Wrigley and her children or child; and the testator proceeded: "Provided always and I do hereby order and direct that the several provisions herein made for my said daughters and their children, and also for any other persons or person being females, shall be for their respective own sole and separate use and benefit, and that their respective receipts under their respective hands, or the receipt or receipts of such person or persons as they respectively shall appoint to receive the same, shall be the only effectual discharge and discharges for the same, notwithstanding any coverture, to the end that the same may be for their respective separate maintenance and support, and not to be paid to them by anticipation."

By a codicil dated May 6, 1848, to his said will the testator gave to any of his daughters who should die leaving issue a power to appoint to her husband a life interest in her share.

The testator died on March 3, 1850.

The testator's daughter Esther, on July 19, 1844, intermarried with Thomas Wrigley Wiley, by whom she had seven children who attained twenty-one, of whom one only, namely, the petitioner Helen Fugl, was born in the testator's lifetime.

Esther Wiley died on June 11, 1875, having appointed a life interest to her husband under the power given her by the codicil. Her husband and the petitioner survived her.

On April 10, 1872, the petitioner intermarried with Silvio Fugl, a Danish subject domiciled in Denmark. The Danish domicil so acquired by the petitioner continued up to the date of these proceedings.

On February 21, 1885, the petitioner and her husband executed a mortgage of the petitioner's share under the testator's will to secure 500*l*.

In the year 1892 the petitioner was on her own application divorced from her husband.

The petitioner's father T. W. Wiley died in September, 1900.

In July, 1901, the surviving trustee of the testator's will paid into court, under the Trustee Act, 1893, a sum of 1124*l.* 7*s.* 8*d.*, representing the share of the petitioner in the testator's estate.

This was a petition presented by Helen Fugl in the Manchester District Registry for the payment to her of the money in court.

Gordon, for the petitioner. The petitioner was in esse at the date of the will, and therefore the case of *Herbert* v. *Webster* (1) is exactly in point. In that case Hall V.-C. followed *Wilson* v. *Wilson* (2), and declined to follow his own decision in *In re Michael's Trusts* (3), and that of Sir George Jessel M.R. in *In re Ridley*. (4) In this case each child took a vested interest as she came into existence, and all the shares must be ascertained and vested within the time fixed by the rule against perpetuities. The restraint on anticipation operates upon each share separately, without mixing them together. It is, therefore, severable and good in respect of the petitioner's share, though void in respect of the shares of children of Mrs. Wiley born after the testator's death: *In re Russell*. (5)

R. J. Parker, for the mortgagee. I admit that the case cannot be distinguished from *Herbert* v. *Webster* (1), but the earlier cases are in direct conflict with that decision, and the point is treated as doubtful by the text-writers: Theobald on Wills, 5th ed. p. 529.

In re Ridley (4) is a decision in the respondent's favour. In *Armitage* v. *Coates* (6) the Master of the Rolls expressed a strong opinion to the same effect, though the point was not decided. In *Cooper* v. *Laroche* (7) Malins V.-C. said that a restraint on anticipation upon the shares of a class, not necessarily all in being within the time required by the rule, was certainly void, though he held it good in the case before him upon grounds which have since been decided to be insufficient.

W. H. Cozens-Hardy, for the trustees.

(1) 15 Ch. D. 610.
(2) (1858) 28 L. J. (Ch.) 95; 4 Jur. (N.S.) 1076.
(3) 46 L. J. (Ch.) 651.
(4) 11 Ch. D. 645.
(5) [1895] 2 Ch. 698.
(6) (1865) 35 Beav. 1.
(7) (1881) 17 Ch. D. 368.

SWINFEN EADY J.
1902
FERNELEY'S TRUSTS. *In re.*

SWINFEN EADY J. In *Herbert* v. *Webster* (1) Hall V.-C. had the decision of the Master of the Rolls in *In re Ridley* (2) before him, and nevertheless felt himself at liberty to follow what appears to me to be the sounder rule. I shall follow the decision of Hall V.-C., and declare that the restraint on anticipation is good and the mortgage void.

[No other order was made on the petition, but it was ordered to stand over for evidence whether, according to the law of Denmark, the petitioner's children, or her divorced husband, had any interest in the fund.]

Solicitors: *Slater, Heelis, Williamson, Colley & Tulloch, Manchester; Orford & Sons, Manchester; Busk, Mellor & Norris, for Slater & Co., Manchester.*

(1) 15 Ch. D. 610. (2) 11 Ch. D. 645.

J. R. B.

In re DEVELOPMENT COMPANY OF CENTRAL AND WEST AFRICA.

SWINFEN EADY J.

1902

Feb. 18.

[1901 D. 0145.]

Company—Reduction of Capital—Scheme—Illegality—Nominal Reduction—Actual Increase—Issue of Capital at a Discount.

A company passed a resolution to reduce its capital by cancelling a class of 1*l.* deferred shares in the nature of founders' shares upon the terms of an agreement that the deferred shareholders should consent to the cancellation, and, as soon as the reduction was confirmed, the capital should be increased, and each deferred shareholder should receive 100 1*l.* ordinary shares, part thereof, in exchange for each 1*l.* deferred share. The agreement was conditional on the company obtaining an order confirming the reduction.

The petition for the confirmatory order was supported by all the shareholders. There were practically no creditors, the only debts being a small sum for current expenses:—

Held, that as the reduction scheme in its entirety really involved an increase of capital, and an issue of part thereof at 99 per cent. discount without any consideration to the company, it was wholly illegal, and the reduction could not be confirmed.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A. C. 399, distinguished.

PETITION.

This was a petition for reduction of capital.

The company was incorporated on February 7, 1901, under the Companies Acts, 1862 to 1900, with a capital of 100,000*l.*, divided into 99,300 ordinary shares and 700 deferred shares of 1*l.* each.

The company had issued about 18,000 ordinary shares and the whole of the deferred shares. All the shares issued were fully paid up.

By clause 5 of the company's memorandum of association the holders of the deferred shares were entitled, first, to half the surplus profits of each year remaining after payment thereout of a non-cumulative dividend to the close of that year at the rate of 10 per cent. per annum on the capital paid up on the ordinary shares, and of a like dividend to the close of that year at such rate not exceeding 10 per cent. per annum as

SWINFEN EADY J.
1902
DEVELOPMENT COMPANY OF CENTRAL AND WEST AFRICA, *In re*.

might be attached to any further shares, whether in the original or any increased capital thereafter issued, and after making due provision for the reserve fund in accordance with the articles; secondly, to one-half of any part of the reserve fund aforesaid, or the income thereof, which it might at any time be determined to divide among the members; and, thirdly, to one-half of the surplus assets which in the winding-up of the company should remain after paying off the whole of the paid-up capital, including that paid on the deferred shares.

The memorandum of association also empowered the company to increase or reduce its capital, and any of the original shares, or any new shares, might be issued with any special rights, preferences, conditions, or qualifications as regards dividends, capital, distribution of assets, voting, or otherwise which might be attached thereto by or in accordance with the company's regulations for the time being, but so that the rights attached to the deferred shares should not be infringed.

Art. 49 provided that the company might reduce its capital (inter alia) by paying off capital, or otherwise as might seem expedient.

Art. 73 provided that on a show of hands every member present in person should have one vote; and upon a poll, every member present in person or by proxy should have one vote for every ordinary share held by him, and twenty votes for every deferred share held by him.

The company, finding the rights of the deferred shareholders somewhat onerous, determined to place all the shares on an equal footing.

By a special resolution passed and confirmed at extraordinary general meetings on November 25 and December 12, 1901, it was resolved that the capital of the company be reduced to 99,300 ordinary shares of 1*l.* each, and that this reduction be effected by cancelling the whole of the 700 deferred shares upon the terms of a conditional agreement dated November 23, 1901.

By this agreement, made between the company of the one part and the deferred shareholders of the other part, it was agreed that the deferred shareholders should consent to the

whole of the 700 deferred shares being cancelled, and should do all acts and things necessary or expedient for that purpose, and that the company should take the necessary steps for reducing its capital in the manner mentioned in the special resolution, and should apply for an order confirming the reduction, and that, if and so soon as the reduction should have been so confirmed, the company should take the necessary steps to increase its capital to 250,000*l.*, divided into 250,000 ordinary shares of 1*l.* each, and should allot and issue to the deferred shareholders as fully paid 70,000 of those shares in exchange for the 700 deferred shares to be cancelled as aforesaid, and should within one month after the allotment satisfy the requirements of s. 7 of the Companies Act, 1900 (63 & 64 Vict. c. 48). The agreement was conditional on the company obtaining an order confirming the proposed reduction.

On December 16, 1901, the company presented a petition asking the Court to confirm the proposed reduction. The petition stated that it was important in the interests of the company that the agreement should be carried into effect, and that the proposed reduction did not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The evidence in support shewed that the company had not borrowed any money, and that its only debts at the date of the petition were certain sums either accrued or accruing due for costs, salaries, and office rent, not exceeding in the aggregate the sum of 300*l.*

The object of the proposed reduction was to enable the company to dispose of its shares with greater facility, and it was considered that this could best be effected by placing all its shares on an equal footing.

Eve, K.C., and *Wurtzburg*, for the company. The Court has power to sanction any scheme of reduction so long as it sees that the interests of creditors, shareholders, and the public are protected. Subject to that, it is for the company alone to judge of the prudence of the scheme: *British and American Trustee and Finance Corporation* v. *Couper*. (1) That case

(1) [1894] A. C. 399.

SWINFEN EADY J.
1902
DEVELOPMENT COMPANY OF CENTRAL AND WEST AFRICA, *In re.*

shews that a company may purchase shares with the view of extinguishing them, and it cannot make any difference in principle whether they pay in cash or by the issue of ordinary shares of the same market value. It cannot affect the validity of the reduction, which is all the Court is really asked to sanction. There are practically no creditors. The shareholders are unanimous in support. The public, who are protected by the publicity of the proceedings and the filing of the agreement, cannot be injured; in fact, owing to the large rights of the deferred shareholders, they will not touch the shares unless the scheme goes through.

W. Gordon Fellowes, for the shareholders, supported the petition.

SWINFEN EADY J. (after referring to the present position of the company and the rights of the deferred shareholders). It is now found that these rights of the deferred shareholders are onerous, and it is desired to get rid of them. A scheme has been proposed whereby in substance the 700 deferred shares are to be surrendered to the company with all their rights, and, in exchange therefor, the deferred shareholders are to have 70,000 ordinary shares allotted to them, so that each holder of a deferred share is to have 100 ordinary shares in exchange for his deferred share. The mode in which it is proposed to carry through this transaction is by reducing the capital of the company in the first instance,—by extinguishing the 700 deferred shares, and then increasing the capital of the company and allotting 70,000 ordinary shares, part thereof, to the persons who were the holders of the deferred shares, without any further consideration or payment to the company. In form the petition asks that a reduction only shall be sanctioned—that is, a reduction by the extinction of the 700 deferred shares. It was not suggested that any part of the capital was lost or unrepresented by available assets, or that any sum should be returned to the shareholders as being in excess of the wants of the company; but the whole of the proposed arrangement was very frankly stated on the face of the petition. In *British and American Trustee and Finance Corpora-*

tion v. *Couper* (1) Lord Macnaghten said that the Court must look at the arrangement as a whole, and have regard to all the circumstances of the case and the consequences which the reduction involved. I therefore consider it my duty in the present case to look at the entire scheme as a whole, and see whether or not I ought to sanction it. It is really a scheme for an increase of capital. The extent of the increase would be 69,300*l.* nominal capital, for which the company in its corporate capacity would receive no consideration. The assets would not be increased, but would remain the same, and the only result would be that the 700 deferred shares would be cancelled, and the rights of the shareholders inter se would be altered. In my judgment the scheme involves the issue of 69,300 shares, not only at a discount, but without any consideration at all moving from the shareholders to the company in its corporate capacity. It is not sufficient for the bargain to be beneficial or adequate as between the shareholders. They are the best judges of that, and they all support the arrangement, which is made in good faith and may be to their advantage. The real question which I have to consider in the present case is whether the scheme is legal. In my judgment it is not. It involves the issue of 70,000*l.* nominal capital in exchange for a surrender of 700*l.* nominal capital without any consideration to the company. In my judgment such a scheme as this is wholly ultra vires. It is in no way authorized by *British and American Trustee and Finance Corporation* v. *Couper* (2), the observations in which apply to the case of a genuine reduction, and not to a case where there is no real reduction but an increase of capital. I therefore dismiss the petition.

Solicitor: *Albert J. Schweder.*

(1) [1894] A. C. 412.

(2) [1894] A. C. 399.

G. R. A.

SWINFEN EADY J.

1902

Feb. 14, 18, 22.

In re PEACOCK'S SETTLEMENT. KELCEY *v.* HARRISON.

[1901 P. 2400.]

Power—Execution—General Power—Married Woman—Appointment by Will—Administrator with the Will annexed—Right to receive Fund.

An administrator with the will annexed can give a valid receipt for settled personalty appointed by will under a general power, even where the appointor was a married woman who died before the coming into operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Re Philbrick's Trusts, (1865) 13 W. R. 570, and *In re Hoskin's Trusts*, (1877) 5 Ch. D. 229; 6 Ch. D. 281, applied.

ORIGINATING SUMMONS.

By a marriage settlement dated January 20, 1875, and made between the intended wife of the first part, the intended husband of the second part, and trustees of the third part, certain funds and securities (including certain policy moneys) were settled upon trust for the wife and husband for their lives and the life of the survivor, and after the death of the survivor, if (as happened) there should be no children of the marriage, upon trust for such persons as the wife should during coverture by will or codicil, and when not under coverture by deed, will, or codicil, appoint.

The marriage took place on January 21, 1875.

By her will dated September 30, 1880, the wife, after referring to the settlement and to her general power of appointment thereunder, appointed and directed that the settled funds (except the policy moneys, of which she made a special disposition) should be paid or transferred to her sister E. J. Ogilvie, and her brother C. F. Ogilvie, upon trust to pay 200*l.* to her niece Rosamond Ashe, and to divide the residue among certain named persons; and she appointed her said sister and brother executrix and executor of her will.

By a codicil dated October 5, 1881, the wife made a different disposition of the policy moneys, which she directed the

trustees of the settlement to pay to certain appointees; but in other respects she confirmed her will.

The wife died on September 14, 1882.

The husband died on April 6, 1900.

The wife left no estate except the said trust funds, and there were no debts.

The executrix and executor having died without proving the will, letters of administration with the will and codicil annexed were granted to the plaintiff on May 31, 1901.

The question arising whether the plaintiff as administratrix could give the defendant, the present trustee of the settlement, a valid receipt or discharge for the appointed funds, this summons was issued to determine the point.

Arthur J. Chitty, for the administratrix. An executor can give a receipt for personalty appointed under a general testamentary power: Farwell on Powers, 2nd ed. p. 325; *Re Philbrick's Trusts* (1); *Hayes* v. *Oatley* (2); *In re Hoskin's Trusts*. (3) The funds, though appointed by a woman who died before the Married Women's Property Act, 1882, are equitable assets for the payment of debts: *Vaughan* v. *Vanderstegen* (4); *London Chartered Bank of Australia* v. *Lemprière* (5); and legacies: *In re Davies' Trusts* (6); *In re Pinède's Settlement* (7); though not for engagements binding her separate estate only: *In re Roper* (8); *In re Armstrong*. (9) They are subject to legacy duty: *In re Cholmondeley* (10); and to the payment of funeral expenses: *In re M'Myn*. (11)

The administratrix with the will annexed, being just as responsible as an executor for these payments, has a corresponding right to receive and distribute the appointed funds.

Martelli, for the trustee of the settlement. Executors take appointed funds as trustees or personæ designatæ, and not virtute officii: *Re Philbrick's Trusts* (1); *Hayes* v. *Oatley* (2);

(1) 13 W. R. 570.
(2) (1872) L. R. 14 Eq. 1.
(3) 5 Ch. D. 229; 6 Ch. D. 281.
(4) (1853) 2 Drew. 165.
(5) (1873) L. R. 4 P. C. 572.
(6) (1871) L. R. 13 Eq. 163, 166.
(7) (1879) 12 Ch. D. 667, 673.
(8) (1888) 39 Ch. D. 482.
(9) (1886) 17 Q. B. D. 521.
(10) (1832) 1 Cr. & M. 149; 38 R. R. 601.
(11) (1886) 33 Ch. D. 575.

SWINFEN EADY J.
1902
PEACOCK'S SETTLEMENT, *In re.*
KELCEY *v.* HARRISON.

In re Hoskin's Trusts (1); *In re Treasure* (2); *In re Maddock* (3); *In re Power.* (4) Secus: *In re Moore.* (5)

An administrator, therefore, who can only take virtute officii has no claim to anything but legal assets, and cannot give a receipt for appointed funds. The policy moneys are expressly directed to be distributed by the trustee of the settlement.

Cur. adv. vult.

Feb. 22. SWINFEN EADY J. It was settled by the cases of *Re Philbrick's Trusts* (6) and *In re Hoskin's Trusts* (1) that where a married woman or any other person, having a general power of appointment over a fund of personalty, makes an appointment of the fund by will, and appoints an executor, that executor, after he has proved the will, is entitled to receive and give a valid discharge for the appointed fund.

The trustee of the settlement did not dispute the authority of those cases, but contended that they only established the proposition that an executor was so entitled, and that an administrator with the will annexed stood in a different position.

It was conceded that there was no authority which shewed that such an administrator stood in any different position, and I am not aware of any principle which requires any distinction to be made.

If the donee of a power does not exercise it, she leaves the funds to go as in default of appointment, and to be administered by the trustees of the instrument; and the like result will follow if she exercises the power by deed, and appoints only to beneficiaries; if, however, she exercises the power by deed, and wishes other trustees to administer the fund, she has only to appoint the fund to those trustees to be held by them upon the trusts then declared.

If the donee exercises the power by will, and still wishes the

(1) 5 Ch. D. 229; 6 Ch. D. 281.
(2) [1900] 2 Ch. 648.
(3) [1901] 2 Ch. 372.
(4) [1901] 2 Ch. 659.
(5) [1901] 1 Ch. 691.
(6) 13 W. R. 570.

original trustees to administer the fund, she can appoint them her executors; or, if she so desires, she may appoint different persons to be her executors, and those persons will then distribute the appointed funds. If, however, she appoints by will, and does not appoint any executors, or if executors appointed by her die or disclaim, I am of opinion that she commits the distribution of the fund to the person to whom the Probate Court shall grant letters of administration with the will annexed.

It has been the practice of the Probate Court for many years to grant administration with the will annexed in the case of the will of a married woman made by virtue of a power, where no executor is named. (See rule 15 of the Rules and Orders for the Principal Registry in Non-contentious Business (1862).)

If the contention put forward by the trustee of the settlement were correct, such an administrator would have no duties whatever to perform.

Moreover, a rule that an executor should be the person to administer, but not an administrator, might give rise to considerable difficulties. Thus an executor might prove the will and receive the trust fund, and die intestate before administering. Who, then, is to complete the administration and division? If an administrator de bonis non cannot do so, is it to be held that the funds must in such a case be repaid to the original trustees? Again, it has long been settled that, by exercising a general power of appointment by will, a testator subjects the appointed property to the payment of all his debts, if and so far as his own property may be insufficient for that purpose, the appointed fund becoming equitable assets. Practical convenience requires that the person to administer these assets shall be the person whose duty it is as executor or administrator to ascertain and provide for debts in a due course of administration.

Again, it is settled law that where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent

SWINFEN EADY J.

1902

PEACOCK'S SETTLEMENT, *In re.* KELCEY *v.* HARRISON.

to which the fund subject to it is required to make the legacies effective. And the same rule would apply though no executor were appointed: *In re Davies' Trusts.* (1)

Now the executor or administrator, as the case may be, is the person to pay these legacies, and the only person who can ascertain, in the event of the testator's own estate being insufficient, how much of the appointed funds will be required to make up the deficiency so as to render the legacies effective.

Upon these grounds I decide that the administratrix in the present case can give a valid receipt and discharge for all the settled funds.

Solicitors: *Harry Wilson & Co., for St. George Ashe, Cambridge; Henry P. Spottiswoode.*

(1) L. R. 13 Eq. 163, 166.

G. R. A.

NEAVERSON *v.* PETERBOROUGH RURAL DISTRICT COUNCIL.

C. A. 1902 Feb. 26.

[1899 N. 1107.]

Prescription—Lost Grant, Presumption of—Inclosure Act—Award—Drainage, Preservation of—Restriction of Pasturage on Road to Sheep—Presumption of Legal Origin to support long User.

A lost grant cannot be presumed where such a grant would have been in contravention of a statute.

By an Act providing for the inclosure of certain commons, and their drainage in connection with that of a larger area in a fen level, as a work of public utility, it was enacted that the herbage on roads to be set out under the Act should belong to the person or persons to whom the Inclosure Commissioners should by their award allot the same, and that in their award the Commissioners should insert such orders, regulations, and determinations, to be observed and followed by the several proprietors, as should be necessary or proper to be inserted therein, for the completing and maintaining of the said drainage and inclosure. By their award the Commissioners awarded that the herbage on certain roads, which adjoined watercourses, should belong to the surveyor of highways, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever. The surveyors of highways had for more than fifty years made a practice of letting the herbage on the roads for the depasturing of a certain number of horses and cattle as well as sheep:—

Held, that, upon the true construction of the Act and award, the prohibition of the pasturage on the roads of stock other than sheep was intended to be a permanent provision; that it was meant, not merely for the protection of the allottees of land under the Act, but also for the preservation of the drainage system in the public interest; that it was therefore not competent for the allottees or any body of persons to make a grant or release in favour of the surveyor of highways, so as to extend the right of pasturage to stock other than sheep; and that consequently a legal origin could not be presumed in order to support the above-mentioned practice of the surveyors of highways.

Decision of Cozens-Hardy J., [1901] 1 Ch. 22, reversed.

APPEAL by the plaintiff from the judgment of Cozens-Hardy J. (1)

The plaintiff was the occupier of a farm, consisting of land allotted under the Newborough Inclosure Act (52 Geo. 3, c. cxliii.), which was intituled "An Act for draining, inclosing, and

(1) [1901] 1 Ch. 22.

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL.

improving the lands called Borough Fen Common, and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish, to be called Newborough; and for building and endowing a church for such parish." Land belonging to the plaintiff's farm was bounded on one side by a private road set out by the award made under the before-mentioned Act and called Moor Road. This road adjoined on one side a fen drain, forming part of the drainage system under the Act, called Moor Drain, and was separated on the other side from the plaintiff's fields by a ditch with a low hedge on the farm side of the ditch. The learned judge held that the soil of the roads was vested in the owners of the allotments under the provisions of the Act and award. The defendants were the rural district council of Peterborough, acting in the capacity of surveyors of highways for the parish of Newborough, and one Vergette, to whom they had let the herbage of Moor Road, for the depasturing of a certain number of horses and cattle as well as sheep, but against whom the action had been discontinued. The action was brought for an injunction to restrain the defendants from grazing or depasturing horses, cattle, or stock, other than sound and healthy sheep, in or upon the Moor Road contrary to the provisions of the before-mentioned Act and the award made under it, and for damages for wrongfully depasturing cattle and horses on the road. The before-mentioned Act, which was passed in 1812, provided that the herbage on roads to be set out under the Act should belong to and be the property of the person or persons to whom the Inclosure Commissioners appointed under the Act should allot and award the same. The material provisions of the Act sufficiently appear from the judgment of Collins M.R. The Commissioners by the award, which was made in 1822, awarded that the herbage on certain roads set out under the award, which adjoined watercourses, including the Moor Road, should belong to and be the property of the surveyor of highways for the time being for the parish of Newborough, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, for the best

rent or rents that could be reasonably obtained for the same, and that such rent or rents should be annually paid and applied towards defraying the charges and expenses of maintaining and keeping the roads in repair. It appeared that, notwithstanding the provisions of the award, the surveyors of highways had since 1846 annually let the herbage on the roads, including the Moor Road, for the pasturage, not merely of sheep, but also of a limited number of cattle and horses. (1) The plaintiff claimed an injunction and damages on the ground that he was by the award bound to maintain the dyke and fence between his farm and the road, and that, by reason of cattle and horses being allowed to graze on the road, the soil of which was of a peaty nature, the banks of the dyke were broken down, and the flow of water in the dyke obstructed, and the cost of cleaning the same increased, and that damage had been caused by horses and cattle breaking through the plaintiff's hedge and eating grass and corn in the fields adjacent to the road.

The learned judge held that an enlargement of the right to depasture the road by grant or release from the owners of the soil to the surveyor of highways ought to be presumed in order to support the long-established user, and therefore gave judgment for the defendants.

Rawlins, K.C., and *Percival*, for the plaintiff. A lost grant cannot be presumed, in order to support ancient user, where such a grant could not legally have been made.

On the true construction of the Act and award, the provision restricting the pasturage on the roads to sheep must have been intended to be a permanent provision for the maintenance of the drainage of the district. It is obvious that the reason why this restriction was inserted in the award was that it was thought that heavy cattle and horses grazing on the road might trample and break down the banks of the adjoining drains, and so cause them to be stopped. There are many

(1) The terms and particulars of these lettings appear from the report in [1901] 1 Ch. 22, and it is not thought necessary to set them out again in this report.

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL.

difficulties in the way of presuming a lost grant or release in the present case. Under the old system of pleading it was necessary, in setting up a lost grant, to specify, as grantor, some one by whom the grant could have been made, and, as grantee, some person to whom it could have been made, if not by name, at any rate by some definite description: *Hendy* v. *Stephenson*. (1) The surveyor of highways is not a corporation. But, assuming that this difficulty could be got over by presuming a grant to some corporate trustee or trustees, there were no persons here entitled to make such a grant or release as has been presumed. Neither the allottees of lands under the Act nor the whole parish would have a right to do so, for the restriction was not imposed solely in their interest. The area included in the Act formed part of a larger drainage district in connection with which it was to be drained, as a work of public utility, and the restriction was imposed in the interests of the public.

[They cited *Halliday* v. *Phillips* (2); *Johnson* v. *Hodgson* (3); *Goodtitle* v. *Baldwin* (4); *Rochdale Canal Co.* v. *Radcliffe*. (5)]

Eve, K.C., and *Schiller*, for the defendants. It is submitted that, on the purview of the Act and award, the provision restricting the pasturage on Moor Road and other roads to sheep was intended to be a temporary provision only. Similar temporary provisions are common in Inclosure Acts. In the case of Inclosure Acts relating to land in other than fen countries, the restriction is generally the converse of that in the present case, the pasturage of cattle being permitted, but not that of sheep. The reason probably was that, the object of the restriction being to protect the hedges newly planted to fence the allotments, it was thought that, until the hedges have grown up, sheep would be more likely to damage the young shoots than cattle. Here, these roads being separated from the allotments by drains, it was probably thought that cattle were more likely to get over the drain and damage the hedge than sheep, and again that cattle would be likely

(1) (1808) 10 East, 55.
(2) (1889) 23 Q. B. D. 48.
(3) (1806) 8 East, 38.
(4) (1809) 11 East, 488; 11 R. R. 249.
(5) (1852) 18 Q. B. 287.

to cause damage to the banks of the watercourses made for the purposes of the Act, before they became consolidated. Such a provision was held to be temporary in the case of *Haigh* v. *West*. (1) That case is a strong authority in favour of the defendants. Again it is submitted that, upon the true construction of the Act and award, the provision restricting the pasturage on the roads to sheep was one introduced for the protection of the owners of the allotments, upon whom the burden of cleansing and keeping up the drains was imposed; and it would clearly be lawful for them in that case to waive that protection, and grant to the surveyor of highways a larger right over their own lands. Assuming that the restriction is to be deemed to have been imposed for the benefit of all the allottees as a body, or the whole of the inhabitants of the parish, it may be presumed that they all combined in an agreement to waive that benefit, and grant a more extended right to the surveyor of highways. It is true that the surveyor of highways is not a corporation, but it may be presumed that a grant was made to some corporate trustee or trustees in his favour. There is nothing in the Act or the award to make it impossible that such a grant or release in favour of the surveyor of highways should be legally made. By the provisions of the Act the Drainage Commissioners are bound to maintain the system of drainage in the area, for which purpose they are to tax the owners of land therein. Therefore any public interest in the preservation of the drainage is sufficiently protected; and the only result, if by the pasturing of cattle on the roads the maintaining of the drains were made more costly, would be that the burden imposed on the owners of the allotments would be increased; but there is nothing illegal in their taking on themselves that additional burden.

[They cited *Campbell* v. *Wilson* (2); *Goldsmid* v. *Great Eastern Ry. Co.* (3)]

Rawlins, K.C., in reply.

COLLINS M.R. This is an appeal from the judgment of Cozens-Hardy J. in favour of the defendants in an action

(1) [1893] 2 Q. B. 19. (2) (1803) 3 East, 294; 7 R. R. 462.
(3) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927.

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

brought by the plaintiff for an injunction to restrain the defendants from grazing or depasturing horses, cattle, and stock, other than sound and healthy sheep, in or upon the private carriage, bridle, and drift road, and footpath, distinguished by the name of Moor Road, set out under the award dated February 4, 1822, of the Commissioners under the Act 52 Geo. 3, which is intituled an Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton, and for forming the same into a parish to be called Newborough, and for building and endowing a church for such parish. The plaintiff also claimed damages against the defendants for injury caused to him, as the occupier of certain lands, by reason of cattle and horses having been wrongfully allowed by the defendants to graze and be depastured on the said road. The plaintiff is the occupier of an allotment adjoining the road called Moor Road. The first set of defendants are the rural district council of Peterborough, who are the successors of the surveyor of highways of the before-mentioned commons, and the second defendant appears to be the owner of the horses and cattle which have been depastured on the road. The defence set up, and given effect to by the learned judge, is not very technically expressed in the statement of defence, and it is not easy to gather from the form of the pleading exactly what defence in point of law was intended to be raised. It is stated in substance as follows. The defendants say, in the alternative, that the said Moor Road was and is a private road, and that the herbage on it, by virtue of the before-mentioned Act and the award made thereunder, became the property of the surveyor of highways for the time being of the Borough Fen Common and the Four Hundred Acre Common, and that the defendants, the rural district council of Peterborough, as the successors to such surveyor of highways, have by themselves or their tenants enjoyed the right to depasture upon the said herbage sheep, stock, horses, and cattle of all kinds for a period of over sixty years, or alternatively for a period of over twenty years. This statement has been explained as meaning that it must be presumed that a grant of some kind was made by some person or persons capable of making such a grant to or in

favour of the surveyor of highways, and that, under and by virtue of that grant, the surveyors of highways had a right to let the herbage on the road for the purpose of depasturing cattle and horses as well as sheep.

The rights of the parties in this case have to be determined by reference to the provisions of the Act of Parliament and the award made pursuant to it. The nature of the legislation affecting this case, which is contained in the Act, may shortly be described as follows. I shall have to refer to it more in detail presently. The Act, which provides for the inclosure and drainage of a particular district, contains a provision forbidding the pasturage of any stock, except sheep, on roads set out in a portion of the district, called the Foreland, adjacent to a then existing dyke, called Carr Dyke. That provision is a substantive part of the Act itself, but there is a further provision in the Act, which provides for the vesting in a person or persons to be nominated by the Inclosure Commissioners in their award of the property in the herbage on all other roads both public and private within the area to be drained. The award made under the Act designated the surveyor of highways for the time being for the area as the person in whom the herbage on certain roads, including Moor Road, was to be vested, and went on to limit the purpose for which he might let the same to the pasturage of sound and healthy sheep. The question is whether, having regard to the provisions of the Act and the award, it would have been legally possible for any person or persons to grant to the surveyor of highways the right to do what by those provisions is forbidden, namely, to let the herbage on the road in question for the purpose of depasturing, not only sheep, but also horses and cattle. There is evidence, no doubt, in this case of a long-continued practice of letting the herbage on the road for the pasturage, not of sheep exclusively, but also of a limited number of horses and cattle. The question is whether that ought to be treated as evidence of a lost grant, which might have had a legal origin. If such a grant could not have had a legal origin, then it is not competent for us to presume its existence. On the other hand, if it could have had a legal origin, then we ought to presume

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

the existence of such a grant, when there is evidence of user for such a long period. It may be more easy to presume the existence of a lost grant under some circumstances than under others. If the grant sought to be presumed were one which affected the rights of a large number of the public, and of which one would suppose there would necessarily be some public record, if it really ever existed, and the period of user were comparatively short, it would be more difficult to infer the existence of the grant than it would be where the grant suggested was by some single and clearly competent owner, in which case a shorter period of user would suffice. I now come to the details of the case.

The Act, as I have said, is entitled an Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton, and for forming the same into a parish to be called Newborough. By its recitals it shews that it is not like an ordinary Inclosure Act, which deals merely with the rights of persons interested in common lands, and provides for dividing those lands among all such persons in severalty. This Act evidences a much larger scheme. It provides for the drainage and inclosure of a certain area of fen land, and not only for that, but also for its drainage in connection with that of a larger area, called the North Level, which is part of the Great Level of the Fens called the Bedford Level. I will not refer to all the recitals of the Act to which our attention has been called, but only to those which appear to be most material. It is recited that by an Act 27 Geo. 2 the fen lands, called the North Level of the Fens, and other lands near thereto in the county of Lincoln, were divided into five districts, the boundaries of which were therein particularly set forth and described, in which boundaries the lands, called Borough Fen Common, and the Four Hundred Acre Common, were included, and declared to be part of the First District of the said North Level, and that the Commissioners appointed under that Act were empowered to assess, rate, and tax the lands in the said First District, excepting certain lands of which Borough Fen Common and the Four Hundred Acre Common were a part,

with certain general rates or taxes, and district taxes as therein mentioned, and were required to lay out the general taxes in cleansing, widening, and deepening certain drains and rivers and other works of drainage, all of which works were essentially necessary to the drainage and protection of the said lands called Borough Fen Common and the Four Hundred Acre Common. The Act then recited that, notwithstanding such exemption from taxes, the proprietors interested in the lands, called Borough Fen Common and the Four Hundred Acre Common, were under the provisions of the said Act of 27 Geo. 2 entitled to have the same protected from upland floods, and the waters thereof to be drained to the sea in like manner as the lands chargeable with the said taxes, and, therefore, it was deemed reasonable and expedient that the said lands, called Borough Fen Common and the Four Hundred Acre Common, should contribute towards the general works and district works, or some of them, provided and required to be made as aforesaid for the protection and drainage of the said North Level, in manner and proportion and on the conditions thereinafter declared. The Act further recited that the said common and waste lands in their then present state were incapable of much improvement, and, for want of a proper and effectual drainage and protection from land floods, were of little benefit to the persons having a right of common thereon or interested therein, and that it would be of great benefit and advantage to the several persons interested in the said common and waste lands "and of public utility," if the same were to be drained, inclosed, divided, and allotted unto and amongst the several persons interested therein according to and in proportion to their respective rights and interests.

After these recitals, the Act proceeded to appoint certain persons Commissioners for draining the said open common and waste fen or marsh land, called Borough Fen Common and the Four Hundred Acre Common, and for dividing and allotting the same among the persons interested therein; and provided that the Commissioners so appointed should from time to time, till the execution of their award, well and effectually protect from upland water, and drain and preserve, and cause to be

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

protected from upland water, the said commons, and for that purpose should repair all such mills or engines, and scour out, repair, and widen all such drains, ditches, watercourses, tunnels, water-gates, sluices, banks, bridges, and other requisites in, over, and upon the lands within the said First District as were then used for those purposes as they might think necessary, and should make, set out, and appoint such new and other mills, engines, and other devices, ditches, drains, watercourses, tunnels, water-gates, sluices, banks, bridges, and other requisites, as well upon, in, through, and over the said lands, as upon, in, through, and over any ancient inclosures or other lands within the said First District, of such size, depth, and breadth, and in such directions as they should think fit. Then by s. 17 of the Act it was provided that the Commissioners should, within two years after the passing of the Act, scour out an ancient drain and watercourse, called Carr Dyke, and heighten and strengthen its banks for the purpose of receiving the waters running from the high lands into the same, and conveying them into a river called the Folly river and thence into the river Welland, and preventing them from overflowing the banks, or injuring the said common and waste lands and other lands in the said North Level, or any part thereof; and by s. 18 it was provided that the Commissioners should set out and allot, out of the Borough Fen Common, among other things, a Foreland on the whole of the east side of Carr Dyke bank of a certain width, and should set out all such roads and ways across and along the said Foreland as should be requisite for the necessary occupation of the old inclosures adjoining to Carr Dyke and the allotments in respect of them, so that the same might conveniently be occupied together, but that it should not be lawful for any person or persons to permit any stock, except sheep, to pasture thereon, or for the lessee for the time being to permit any stock, except sheep, to pasture thereon, and that all cattle, except sheep, found pasturing thereon should be deemed to be trespassing, and that it should be lawful for the Bedford Level Corporation, or any others interested in the preservation of the said Foreland, to impound the stock so found pasturing thereon. Then by s. 20 it was

enacted that the banks of Carr Dyke, and also the said Foreland, should be kept and preserved by the said Commissioners, or the Commissioners for drainage thereinafter mentioned, as pasture or grass land, and the grass and herbage of the said banks and Foreland, and also the fisheries in the Carr Dyke and all other the drains to be made, scoured out, and preserved, pursuant to the Act, should be let by the said Commissioners, or by the Commissioners of drainage, at their annual meetings in every year for the best rent that could reasonably be obtained for the same under such regulations, and subject to such restrictions as they should think necessary, and the moneys arising from such letting should be applied for the general purposes of the Act. The Act then made provisions for the setting out and appointing by the Commissioners of public and private carriage, bridle, and drift roads and footpaths in, over, and upon the lands to be drained, allotted, and inclosed, and of allotments to the surveyors of highways of parts of such lands for gravel pits; and by s. 21, which is very material, it was provided that the herbage of these allotments, and also of the public and private roads, should belong to and be the property of the person or persons to whom the Commissioners should allot and award the same. There are many expressions in the Act which point to the importance attached by the framers of it to the maintenance of the drainage system thereby provided for in the public interest, and which indicate that any provisions made for the preservation of that system were meant to be, not temporary merely, but permanent provisions for the purpose of securing the objects mentioned in the recitals of the Act. It was enacted by s. 57 that, as soon as the Commissioners should have completed, among other things, the divisions and allotments directed to be made by them, and should have made, executed, and completed all such works of drainage as were therein provided for, and have done, performed, and executed all and every the several matters and things which by the Act they were directed and empowered to do, they should draw up an award, which should express distinctly and separately the quantity and contents contained in the lands to be divided and inclosed, and the quantity, contents, situation, abuttals, and

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

boundaries of the several parcels and allotments by them set out and allotted, and also describe all the public roads and ways, and all private roads and ways, and all mills, engines, drains, ditches, tunnels, watercourses, water-gates, sluices, banks, bridges, and other works which should have been made or repaired by them respectively pursuant to the Act, or that should be deemed necessary by them for the preservation and drainage of the said common and waste land, and also all such other orders, regulations, and determinations, to be observed and followed by the several proprietors, as should be necessary or proper to be inserted in the said award, conformable with the tenor or purport of the Act and the recited Act, or for the completing and maintaining the said divisions, drainage, and inclosure. By s. 61 of the Act provision was made for the appointment of a body of persons, who were to be Commissioners for the future drainage and preservation of the said lands and grounds. It was enacted by s. 74 that the said Commissioners of drainage should from time to time repair and work all such mills and engines as were then erected, or which should be erected by the first-mentioned Commissioners, and scour out, widen, heighten, strengthen, and repair all such other drains, ditches, watercourses, tunnels, water-gates, sluices, banks, bridges, and other requisites as might be used for the drainage and preservation of the said lands, and should also make, erect, and set up, and work such new and other mills, engines, and other devices, ditches, drains, &c., and other requisites within the said First District as should in their discretion be necessary and proper for the drainage and preservation of the said lands; and by s. 79 it was enacted that the said Commissioners of drainage should from time to time, as occasion should require, assess, rate, tax, and charge all and singular the lands and grounds directed to be inclosed and drained with such an annual acre tax as should be necessary to defray the expenses of the several works necessary for the future drainage and preservation of the said lands and therein authorized to be done by the said Commissioners of drainage. By s. 82 it was provided that the moneys arising from the taxes to be raised by virtue of the Act, and all other moneys to

be collected and received by the Commissioners of drainage, should be paid and applied in paying all such costs, charges, and expenses as should be necessary, and should be incurred by them, in executing the several matters and things therein authorized by them to be done and executed pursuant to the powers therein contained, in order to obtain a drainage of the waters on the said lands through the several rivers and drains towards the sea. By s. 89 it was provided that, if any person should maliciously cut, break down, burn, demolish, or destroy any mills, banks, and hedges already made or erected, or which might thereafter be made or erected, supported, or maintained for the purposes of the Act, he should be liable to be punished as a felon, and, if any person should wilfully stop, dam up, or damage any rivers, drains, watercourses, dams, or other works already made or erected, or which should thereafter be made or erected, supported or maintained, for any of the purposes aforesaid, he should be liable to forfeit a sum not exceeding 5*l.* to the said Commissioners of drainage to be applied by them for the purposes of the Act.

I have referred to these passages in the Act as shewing that all the provisions thereby made are intended, not as merely temporary arrangements for the drainage of the area to which it relates, but as a permanent scheme for the drainage of that area, not only for the benefit of persons interested in it, but as part of a larger district already provided for by other Acts, which scheme is to provide in connection with those Acts for a complete and systematic drainage of the whole area down to the sea.

Returning to the question as to the herbage on the roads, which by s. 21 was to belong to the person or persons to whom the Inclosure Commissioners should allot the same, the award, which was made in 1822, the Act having been passed in 1812, after setting out among other things the allotments and certain public and private roads, provided, as to certain of the roads included in the area inclosed, among which was the road in question, that the herbage thereon should belong to and be the property of the surveyor for the time being of the highways to be appointed for the said common or waste lands, called

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

Borough Fen Common and the Four Hundred Acre Common, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that could be reasonably obtained for the same, and that such rent or rents should be annually paid and applied towards defraying the charges and expenses of maintaining and keeping in repair the said public and private roads. It appears from the award that when it was made the fences between this road and the allotments had been already made, for the award provided that the owners for the time being of the allotments bounded by the road in question should support and keep in repair the fences thereof against the roads on which they abutted, fences having already been made in pursuance of the directions and authorities contained in the Act. The award also provided that the owners of allotments should from time to time, when necessary, at their own cost well and sufficiently cleanse and scour out the several fence ditches of and within their several allotments for the free passage of water along such ditches.

We have therefore the following considerations to deal with in deciding this case. The Act contemplates the establishment of a permanent system of drainage for the area to which it relates in connection with a larger area, and, as incidental to that scheme, it contains an express provision with regard to the roads in a certain part of the area, namely the Foreland near the Carr Dyke, that the herbage on them shall be depastured only by sheep, and it provides with regard to the herbage on other roads that it shall be the property of the person or persons to whom the Commissioners shall allot the same; and then comes the award, which now has the force of an Act of Parliament, vesting the herbage on those roads in the surveyor of highways, and providing that he shall let it only for the purpose of being depastured by sound and healthy sheep and by no other cattle or stock whatever. What is the reason for excluding stock other than sheep? I think that the obvious reason for making this provision is that it was thought that cattle and horses might, by trampling down the banks of the drains, cause a difficulty in maintaining

them, and so do a public mischief by interfering with the working of the drainage system. It appears to me that the provision which excluded stock other than sheep was intended to be ancillary to the main object of the Act, and not a mere temporary provision relating only to a time antecedent to the award, during which the fences were growing up and the banks becoming consolidated. The fences on the land in question, and probably those on the other lands allotted, had been made before the award was published, and the restriction as to cattle is introduced with regard to this road for the first time in the award of the Commissioners, to whom the Act intrusts the power of determining what shall be done with the herbage on the roads other than that on the roads expressly provided for in the Act. I do not think that, in the face of that provision in the award, it would be competent for the owner of the soil of this road or any other persons to grant the right of depasturing cattle and horses on it, because that would be distinctly contrary to the purpose of the Act. It appears to me that the test, by which to determine whether the Court ought to presume a lost grant in this case, is to consider whether, immediately after the making of the award, the owners of the allotments, or any other persons, could legally have met together and agreed to grant to the surveyor of highways the right to depasture cattle and horses on the roads. I think that such a grant would have been directly contrary to statutory provisions, which made it unlawful to depasture stock other than sheep on the road, because it might interfere with the drainage of the district, and make it more difficult for the Drainage Commissioners, who, after the making of the award, were charged with the duty of maintaining the drainage of the district, to keep the drains open.

It was argued that the provisions of the Act relied on by the plaintiff's counsel afforded no obstacle to the presumption of a lost grant on two grounds, one being that they were only for the benefit of the proprietors of lands adjoining the roads, upon whom was imposed the obligation of keeping the ditches cleansed, and the other being that they were only temporary provisions meant to cover the period during which the drains

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

were being got into working order, and the fences were growing up; and that, after that period, there was no occasion for them, and therefore the Act ought not be construed as negativing the legality of depasturing the road with cattle and horses after that period had expired. I have already dealt with the question whether these provisions were merely of a temporary nature, and I think that we cannot infer from the Act that they were introduced merely for the purpose of benefiting the owners of the adjoining lands. They were, in my opinion, part of a scheme intended for a larger and a permanent purpose, namely the maintenance of a continuous system of through drainage of the area to which the Act related in connection with a larger area. The Moor Drain, which adjoins the road in question on one side, is not merely a subsidiary drain, but extends for a long distance, and is clearly one of the drains which is necessary for carrying out the main purpose of the Act.

We were pressed with the case of *Haigh* v. *West* (1), mainly on the question whether the provision restricting the pasturage to sheep was temporary only. The decision in that case, so far as that point was concerned, appears to have turned on an Act of such a special character that the case was not deemed worth reporting in the *Law Reports* on that point. Moreover, the provisions of the Act there in question were directed to a subject-matter wholly different from that involved in the present case. That Act did not deal with the drainage of fen land, and the Court construed the provisions of it, which prohibited the keeping of sheep on the highways set out by the Commissioners, as merely directed to the period before the main provisions of the Act came into operation. Here the provision, which limits the right of the surveyor with regard to depasturing stock on the road, is made by the award, ten years after the passing of the Act, when all the preliminary operations under the Act had been carried out, and the fences and drains had been made. It seems to me impossible in this case to draw any other inference from the legislation than that the intention was that the provision for excluding cattle from

(1) [1893] 2 Q. B. 19.

the roads was intended to be a permanent feature of the scheme for the maintenance of the drainage of the area, and not temporary only.

Again, it is essential to consider who, if a grant is to be presumed, are to be the supposed grantors and grantee. The defendants' counsel found themselves in considerable difficulties in this respect. I agree that the Court is endowed with a great power of imagination for the purpose of supporting ancient user. But, in inferring a legal origin for such user, it cannot infer one which would involve illegality. That was laid down in *Rochdale Canal Co.* v. *Radcliffe*. (1) In that case there were provisions in an Act, under which millowners were entitled to use water from a canal for a certain purpose. A millowner had for many years used water from the canal for other purposes. It was held that that user could not give him a right, because, the canal company being debarred from supplying him with water except as authorized by the Act, the grant of such a right by the canal company would be illegal. If what I have said as to the effect of the Act in this case is correct, such a grant as is here suggested would have been illegal, whoever is supposed to have made it. But that is not all. Such a grant must be made to some grantee. It is suggested that a grant in favour of the surveyor of highways may be inferred. There is some difficulty as to such a grant, because the surveyor of highways is not a corporation. It is said that a grant might be made to some trustee for him. Possibly the difficulty as to the grantee might be so surmounted. But a much greater difficulty arises as to the supposed grantors. The learned judge appears to have been of opinion that the owners of the soil of the private roads might release the surveyor from the restriction as to the letting of the herbage. But, as I have already pointed out, the restriction not being intended merely for their benefit, they had no power to waive it, and, if they did so, they did what they had no power to do, and what the Legislature forbids. The whole of the herbage is vested in the surveyor, and they have no property in it, nor any right to extend his powers with regard

(1) 18 Q. B. 287.

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Collins M.R.

to it. It was suggested that the whole of the inhabitants of the parish might be supposed to have made the grant. But they had no more power to do so than the owners of the soil of the roads. The scheme of drainage contained in the Act was not made for their benefit alone. The Drainage Commissioners were charged with the duty of maintaining and safeguarding the drainage system of the area to which the Act relates, the purpose of which was not limited to that area, but was intended for the benefit of that larger portion of the public, which might be interested in the keeping of this fen land drained and in a salubrious condition. If anything is to be presumed in this case, it would be necessary to presume a lost Act of Parliament. It would be absurd to ask us to presume the passing of such an Act subsequently to the year 1822.

It is clear that, if the defendants cannot justify letting the herbage on Moor Road for depasturing horses and cattle, the plaintiff is entitled to maintain his action for some damages, as having been injured by their illegal action.

For these reasons I think that the judgment of the learned judge cannot be supported. The appeal must therefore be allowed, and judgment entered for the plaintiff for 40*s.* damages. (1)

ROMER L.J. I have arrived at the same conclusion in this case as the Master of the Rolls. In the first place, I think it clear from the provisions of the Inclosure Act that the duties of the Inclosure Commissioners appointed under it, and those of the Drainage Commissioners, who were to succeed them, were not confined to merely draining and allotting among the commoners the area to which the Act relates. In my opinion it was intended by the Act that they should do more than that, namely, that they should provide for the maintenance and preservation of the drainage of that area, regarded not merely by itself, but as forming part of a general system of drainage for a larger area, whereby the waters from the whole area might be carried through the drains into the rivers of the district, and so down to the sea. I think also that the allottees

(1) The claim for an injunction was not pressed.

under the award to be made were not the only persons interested under the Act and the award, but the rights of a larger portion of the public were concerned. It appears to me that the Commissioners, in making their award, had rights of a public character to regard, and that provisions made by them in that award, for the purpose of preserving the drainage of the district, must be considered as provisions made in the interests of the public. That being so, I do not think that all the allottees under the Act could legally combine together to abrogate any of those provisions. They would have no right, for instance, as it seems to me, to agree to stop up a watercourse adjudged by the award of the Commissioners to be necessary or proper for the drainage of the area and required to be preserved for that purpose. A fair test appears to me to be this. If it were right to say, as to one or some of the drains or watercourses adjudged by the Commissioners' award to be essential for the drainage of the area, that the allottees had power to decide that such a drain or watercourse was unnecessary, and to deal with it accordingly of their own motion, then they might go on from one to another, and ultimately claim the right to do away with the whole system of drainage, if they chose, and allow the land to go back to its ancient state and become a fen again. I think that is a position which the allottees, all combining together, could not legally take up. Still less could one or some of them claim to stop or interfere with a particular watercourse provided for the drainage of the area, because it happened to flow by his or their allotment or allotments. I think, therefore, that all the provisions, as to which it can be gathered from the Act and award that they were intended to be of a permanent character for the preservation of the drainage system of the area, are provisions which it is not competent either for the owners of the allotments, or the inhabitants of the parish constituted under the Act, to release or do away with by any grant made by them.

I now come to the consideration of the particular provisions of the award which are material to the present case. In the first place, it is admitted that the award must be treated as

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL. Romer L.J.

valid, including that part of it which relates to the limitation of the right to depasture stock on these private roads. The question then arises, Why was that limitation inserted in the award? I come to the conclusion that it was inserted in order to assist in carrying out the general purposes of the Act, including the preservation of the drainage of the district, and not merely for the protection of the owners of land adjoining the road, or of the owners of the soil of the road. I further am of opinion that, upon the true construction of the Act and award, the provision imposing this limitation on the right of depasturing stock on the roads was intended to be of a permanent and not a temporary character. This case is quite distinguishable from that of *Haigh* v. *West* (1), which turned on the construction of the particular provisions of the Act there in question, and the special circumstances of that case. As a matter of fact, we all know that the depasturing of heavy cattle on roads which adjoin ditches would tend to destroy and break down their banks, and so to choke up the ditch; and one can, therefore, very well see why the Inclosure Commissioners should have limited the right of pasturage as they have done. It is to be observed that the provision limits the pasturage of sheep to those that are sound and healthy. I do not think that that limitation was inserted solely with regard to the interests of the adjoining landowners. I think that the Commissioners must have borne in mind that they were dealing with roads close to watercourses, through which the water flowed from district to district, and that they considered that to have infected or unsound sheep on such a road might tend to cause mischief to the public. That seems to be a provision not made merely in the limited interests of the adjoining landowners, but also in the interest of a larger public. It is worthy of notice that in this award we find instances where the Inclosure Commissioners, having power to do so, did grant unlimited rights of pasture over roads. But it appears on examination that in those cases the road and pasturage was not adjacent to important through drains along which the drainage of the district had to pass. It appears in the case now before us that

(1) [1893] 2 Q. B. 19.

on one side Moor Road, the road in question in this appeal, adjoins an important through drain or watercourse of that kind. It follows from the considerations which I have mentioned, in my opinion, that the provision limiting the right of pasturage on this road was not intended for the protection of the allottees only, but was a provision made for the public purpose of preserving the drainage system of the area; and therefore that it could not be disregarded, or released, or made the subject of a grant by the owners of the adjacent lands or the inhabitants of the parish. I do not see how, consistently with the public duties imposed by the Act upon the Drainage Commissioners, the limited right of pasturage given by the award could be extended, and the surveyor of highways freed from the limitation imposed by the Inclosure Commissioners. Under the circumstances of this case, therefore, I do not see how the Court can properly presume a lost grant, by which the surveyor was freed from that limitation. On these grounds I think that the defence set up by the defendants fails. It is clear that, if their action was wrongful, the plaintiff is entitled to damages, because he has been thereby injured. This is not a case in which an injunction appears to be necessary, and I think the justice of the case will be met by giving the plaintiff judgment for 40*s*. damages with costs.

MATHEW L.J. I am of the same opinion. I could better have understood much of the argument for the defendants if this case could be regarded as one in which common land had been divided into allotments by agreement between the persons interested therein. It might with some reason then be said that a provision made in pursuance of such an agreement might be considered as made in the interest of the allottees, and therefore might be released by them. Such a case would be a totally different one from that with which we are here dealing. It appears to me impossible to read this Act without seeing that the paramount object of it was the conversion of fen land, which was of little or no value, into valuable property. The allotments to be made would have been worth nothing if the land had remained in its swampy

C. A. 1902

NEAVERSON v. PETERBOROUGH RURAL COUNCIL.

Mathew L.J.

condition. The main purpose of the Act was in the public interest to convert marshy land into dry land. That object was provided for in the following manner. Commissioners were appointed with ample power to take the necessary steps for draining the land, and making it fit for allotment. An interval was allowed before the making of the award, during which all the necessary works of drainage were to be executed, and, when they were executed, an award was to be made, which was to contain such provisions and regulations as the Commissioners might think essential for maintaining the drainage of the land and rendering it valuable. When that award was executed, the functions of the Inclosure Commissioners were to cease, and their place was to be taken by another body, called the Drainage Commissioners, whose duty it was to protect and preserve the drainage system already established by the Inclosure Commissioners. It is argued that a provision made by the Inclosure Commissioners in their award, in pursuance of the objects of the Act, can somehow or other be got rid of through the action of the allottees under the Act. The suggestion that this can be done through the presumption of a lost grant seems to me really to amount to saying that statutory provisions can be repealed by the allottees, although they were not made solely in the interest of individuals, but also in that of the public. In my opinion, the restriction on pasturage was clearly not intended to be merely temporary. The provisions made by the Inclosure Commissioners in their award must be taken to relate to the period after they had done their work, and to be provisions which were intended to be retained in force by the Drainage Commissioners in perpetuity. It was argued that the frontagers on the roads could create a trust in favour of the surveyor of highways so as to get rid of the restriction as to pasturage. I do not think they had any power to repeal the provisions of the statute to that extent. I do not see how they could bind the Drainage Commissioners by such an arrangement, or how anything of the kind could be done without the assistance of those Commissioners. Then could the Drainage Commissioners have joined in the creation of any such trust? Clearly not,

for, in so doing, they would have been violating the provisions of the statute. Under these circumstances I do not see how there could be a legal origin for the practice of letting the herbage on the road in question for depasturing horses and cattle as well as sheep. For these reasons I agree that the appeal should be allowed.

C. A. 1902 NEAVERSON v. PETERBOROUGH RURAL COUNCIL.

Solicitors for plaintiff: *Clarke, Rawlins & Co., for Percival & Son, Peterborough.*

Solicitor for defendants: *J. Matthew Voss, for J. W. Buckle, Peterborough.*

E. L.

DEVERGES *v.* SANDEMAN, CLARK & CO.

C. A. 1902 *Jan.* 24, 30; *March* 1.

[1899 D. 1935.]

Mortgage—Shares in Company—Implied Power of Sale—Notice to Mortgagor—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 20.

The mortgagee of shares (the mortgage not being by deed) has, in the absence of an express power of sale, an implied power to sell the shares on default by the mortgagor in payment of the amount due at the time appointed for payment, or, if no time be fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a day certain.

Per Stirling and Cozens-Hardy L.JJ.: A month's notice, or even less, would be a reasonable notice.

Sects. 19 and 20 of the Conveyancing Act, 1881, do not affect the power of sale which is implied in the case of a mortgage of shares not made by deed.

Decision of Farwell J. [1901] 1 Ch. 70, that the defendants were justified in selling shares which had been mortgaged to them by the plaintiff, without any express power of sale, affirmed, Vaughan Williams L.J. dissenting, on the ground that a proper notice, requiring payment of the mortgage debt on a day certain, had not been given by the defendants to the plaintiff.

APPEAL against the decision of Farwell J. (1)

The action was brought for the redemption of 1050 shares in a company called the Central and West Boulder Gold Mines, Limited, or, in the alternative, for damages for the wrongful sale of those shares by the defendants.

(1) [1901] 1 Ch. 70.

C. A. 1902 — DEVERGES v. SANDEMAN, CLARK & Co.

The defendants were stockbrokers. On July 13, 1897, they, on the instructions of the plaintiff, who was a Spaniard, purchased for him 400 shares in a company called the Central Boulder Gold Mines, Limited. The purchase was made for the next settling day, July 29, 1897. The plaintiff paid only a part of the purchase-money, and the defendants paid the balance for him, upon the terms of an agreement with him (not by deed) that they should have a charge upon the shares for the sum which they paid, with interest thereon at 6 per cent. per annum. By the desire of the plaintiff the shares were transferred to the defendants and were registered in their names. No date was fixed for the repayment of the advance, and no express power to sell the shares was given to the defendants. On August 31, 1897, the defendants wrote to the plaintiff as follows:—

"We have been expecting to receive from you the further remittance as promised by you to complete the amount due to us on the purchase of the 400 shares, which have been, as desired by you, registered in our names, and are, subject to the amount you owe us, plus interest to the next account day, 15th September, at your disposal.

"Should you not place us in funds by that date we shall deem ourselves at liberty to sell, at our discretion as to date, and at the then market price, the shares we hold."

In consequence of illness the plaintiff did not at once reply to this letter, but on October 12, 1897, he wrote to the defendants inclosing a cheque for 50*l.*, and saying that he hoped shortly to send them the balance.

In October and November, 1897, the defendants, by the plaintiff's instructions, purchased for him 300 more shares in the company. He did not provide the whole of the purchase-money, but they paid the balance which was not paid by him on the same terms as before, and the shares were registered in their names. On October 22, 1897, he sent to the defendants a cheque for 126*l.* 15*s.*, and on November 30 he sent them another cheque for 12*l.* 3*s.* 10*d.* He never made any further payment on account of the purchase-money of the shares.

All the unpaid purchase-money remained due on May 31,

1898, on which day the defendants wrote to the plaintiff a letter in which they expressed their desire that he would not further delay in fulfilling his promise to liquidate his indebtedness to them, which they stated amounted at the end of March to 577*l.* 10*s.* 6*d.*, and carried an accruing 6 per cent. interest. They informed him that the shares were then only worth a doubtful 10*s.* per share. They added: "We are waiting to receive either funds from you to pay for them" (the shares) "or your instructions to sell them at a given price, and moneys to meet the deficiencies which have gradually accumulated since your purchases." On June 7 the plaintiff replied to the effect that he had not received some money due to him in London, and that this was the cause of the delay, but that he expected to receive it in the course of the month, and then he would settle with them. Shortly after this a scheme for the reconstruction of the company under s. 161 of the Companies Act, 1862, was resolved on. The reconstituted company was to be called the Central and West Boulder Gold Mines, Limited. Under this scheme each assenting shareholder was to receive, in exchange for every two 1*l.* shares held by him, three shares in the new company of 1*l.*, but with only 17*s.* per share paid up; and September 9 was fixed as the last day for assents by shareholders. Correspondence took place between the defendants and the plaintiff with reference to this scheme in June and July. In a letter of June 13, in which the defendants informed the plaintiff of the nature of the reconstruction scheme, they said: "We will thank you to give us by return of post your positive instructions as to selling your shares or your intimation of your desire to participate in the new company and your adoption of the liability thereon. In either case we count on receiving your remittance for the amount overdue on your purchases of the original shares."

On August 22, 1898, the defendants wrote to the plaintiff asking him "to give us your decision whether you intend participating in the reconstruction of the company, thereby incurring a liability of 3*s.* on 1050 shares, or whether you will adopt the only other alternative of allowing your shares to be forfeited, and thereby accept the entire loss and sacrifice

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & Co.

of the shares you have purchased, but which you have not yet entirely paid us for. It seems wise to join in the scheme on the off-chance of success, or with a view of seizing some possible opportunity of selling at a price in advance of the amount payable on joining this scheme. Having regard to the position you have placed us in, we are compelled to give you clear notice that we shall not apply for the 1050 shares, adopting the liability of 3*s*. per share (which must be done previous to September 9) on your behalf or for your benefit, excepting always that (sic) you have previously remitted to us, and also accompanying your instructions with a further remittance to cover the amount payable on these new shares. We further regret having to inform you that, as you have not fulfilled your promise by remitting us the money to complete the purchase of the shares, and that we are unprovided by any security, we shall deem ourselves at liberty to adopt at our pleasure such steps as may unfortunately be necessary to recover the debts due by you to us."

On September 3, 1898, the plaintiff's clerk by his direction wrote to the defendants stating that the plaintiff was ill, and that, by reason of difficulties in trade in consequence of the war, he was "unable to dispose of the less (sic) sum of money"; the writer continued: "That said, you will see the manner of managing his interests at the matter of Central Boulders Gold Mines shares, hoping that you will obtain at less (sic) the sum you have paid."

On September 9 the defendants replied to this letter, and said that unless they received a remittance in response to a telegram which they had sent to the plaintiff ("must have cash remittance") they must reluctantly take steps to recover their debt. The letter stated that the remittance required must be of the moneys due to the defendants, with a further sum to cover the amount payable on claiming and taking up the new shares. On the same day notice was given by the liquidators of the company that the time for applying for the new shares under the reconstruction scheme was extended to September 23. On September 15 the defendants wrote to the plaintiff, informing him of the extension to September 23, and said: "We must

receive a remittance from you before that day in order to take the new shares on your behalf. We would impress on you that, if you fail to remit, you will lose all interest in the shares, and we must proceed against you to recover the sums we have paid on your account." On September 19 the plaintiff wrote to the effect that it was quite impossible for him at that moment to remit cash as was desired by the defendants. On October 3, 1898, the defendants wrote to the plaintiff, inclosing a statement of account shewing "balance of payments made by us on your account, with interest to 30th ult., due to us of 595*l.* 2*s.* 9*d.*," and they asked him to remit this sum to them forthwith. On November 16, 1898, the defendants wrote again to the plaintiff, reminding him of their letter of October 3, and renewing their application to him "to liquidate this sum, or even a material portion of it." They went on to speak of it as an "unsecured debt," and added that, if he found it necessary to delay the settlement of it, he ought to hypothecate to them bonds or properties of a minimum value of 600*l.*, "as it is unreasonable as well as unfair to us to remain in our debt without giving us any protection whatever." The defendants did not in this letter inform the plaintiff that they had already taken up the 1050 new shares in exchange for the 700 old ones.

In July, 1899, the plaintiff was in England, and he then discovered that the defendants had taken up the 1050 shares, and had sold them in the previous March. Shortly afterwards he commenced this action.

Farwell J. held that the defendants had an implied power to sell the shares, and that they had given proper notice to the plaintiff before so doing. And he directed an account to be taken.

The plaintiff appealed.

Robert Wallace, K.C., and *G. H. Stutfield*, for the plaintiff. We submit, first, that the defendants had no power to sell the shares without giving the plaintiff notice. In *Tucker* v. *Wilson* (1), which was relied upon by the learned judge below, there was

(1) (1714) 1 P. Wms. 261, sub nom. *Wilson* v. *Tooker*, 5 Bro. P. C. 193.

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & Co.

in fact notice and also an assent by the mortgagor to a sale, to be implied from his request that the sale should be deferred for a week. The basis of the decision was that the mortgagor was in default, and that the mortgagees had given him notice that if he did not redeem within a certain time they would sell, and the mortgagor would be taken to assent. Subsequent cases follow the same principle. In *Lockwood* v. *Ewer* (1), which was cited by the defendants in the Court below, all that was decided was that a mortgagor of stock would not be allowed to bring an action for redemption twenty years after the date of the mortgage. All the authorities were discussed in *In re Morritt* (2), where it was held, according to the head-note, that a mortgagee of personal chattels of which he has taken possession has, without any express power in the mortgage deed, upon default in payment of the mortgage money by the mortgagor, and after "reasonable notice" to him, power to sell the chattels.

All that it is necessary for the plaintiff to shew is that a mortgagee of stock is obliged to give the mortgagor notice before sale. Cotton L.J., in reference to a pledge of personal chattels, said (3) that there is an implied power of sale, but only after notice to the pledgor. There is no reported case in which notice has not been the basis of the judgment, the Court proceeding upon an implied assent to the sale. The learned judge below took the view that in *Tucker* v. *Wilson* (4) there was notice. At all events, the doctrine of *Tucker* v. *Wilson* (4) cannot apply to such a case as this, where the defendants told the plaintiff that the shares were forfeited, the security gone, and nothing was left for him to redeem.

[VAUGHAN WILLIAMS L.J. referred to Robbins on Mortgages, vol. i. pp. 275–6.]

Secondly, we submit that, under the present law, the defendants, as mortgagees, had no power to sell these shares. Formerly, a mortgagee of personalty had an implied power to sell, the reason being that it was important that commercial

(1) (1742) 2 Atk. 303.
(2) (1886) 18 Q. B. D. 222.
(3) Ibid. 232.
(4) 1 P. Wms. 261, sub nom. *Wilson* v. *Tooker*, 5 Bro. P. C. 193.

men, who had, perhaps, no time, in a pressing matter of business, for a formal mortgage involving the necessity of enforcing it by a decree for sale or foreclosure, should have a security readily realizable. But then came the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 of which provides what the powers of a mortgagee, whether of realty or personalty, shall be. Those powers include a power of sale when the mortgage money has become due; but by s. 20 that power is not to be exercised until notice requiring payment has been served upon the mortgagor, and default is made for three months after service. And it is to be particularly observed that these powers are given only when the mortgage is made by "deed." So that, if there is no "deed," there is no power of sale, either of realty or personalty, the Act thus placing real and personal property on the same footing in this respect. Accordingly, assuming there was formerly in fact a power of sale of personal property—and there was none of real estate before Lord Cranworth's Act, 23 & 24 Vict. c. 145—the Act of 1881, with reference to both classes of property, excludes a power of sale when the mortgage is not by "deed." It therefore swept away any power of sale which previously existed, such as the restricted power of sale under the Chancery Amendment Act, 15 & 16 Vict. c. 86, s. 48: *Wayn* v. *Lewis* (1): a power much enlarged by s. 25 of the Act of 1881, which applies to sales in foreclosure actions relating to either realty or personalty. The enlarged powers so given to a mortgagee have done away with the reasons stated in *Tucker* v. *Wilson* (2) for giving a mortgagee of stocks or shares a power of sale as inherent in his mortgage. We therefore submit that the law of mortgage as to both real and personal property must now be treated as assimilated.

Even if the Court disapproves this contention, and holds that in a mortgage of personalty there is an inherent power of sale, we submit that the mortgagor is entitled to notice of the precise amount of his indebtedness, and of the mortgagee's intention to exercise his power of sale, in order that he, the

(1) (1853) 1 Drew. 487.
(2) 1 P. Wms. 261, sub nom. *Wilson* v. *Tooker*, 5 Bro. P. C. 193.

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & CO.

mortgagor, may have an opportunity of exercising his right to redeem. It is inequitable and oppressive that a mortgagee should have power to sell without notice: *Miller* v. *Cook* (1); and there should be at least reasonable notice. None such was given here. The defendants cannot rely on their letter of August 31, for the circumstances were subsequently altered, and in fact they practically waived their right to sell if they had any.

Upjohn, K.C., and *Stewart-Smith*, for the defendants. We submit that the decision of the learned judge was right, and that the defendants had power as mortgagees to sell these shares after a reasonable time had elapsed for payment of the money. The plaintiff had distinct notice, in the defendants' letter of August 31, 1897, of their intention to sell if they thought fit, and, as the learned judge pointed out, that was not dissented from in any way, and other shares were subsequently bought on the footing of that letter remaining unchallenged. Not only so, but all the letters from April to September, 1898, constituted notices requiring payment. Especially was the letter of August 22, 1898, which informed the plaintiff that unless he took up the new shares all his shares would be forfeited, such a notice as entitled the defendants to sell.

The new shares in the reconstructed company stand in the same position as the original shares in the old company. They resemble a renewed lease when the original lease has been mortgaged. It is well settled that the pledgee of personal chattels has by law an implied power to sell the chattels in default of payment of the debt by the pledgor at the time fixed for payment, or, if no time is fixed, within a reasonable time after notice by the pledgee requiring payment, and a mortgagee of personal chattels after he has taken possession has a similar power: *In re Morritt* (2); *Ex parte Hubbard.* (3)

[VAUGHAN WILLIAMS L.J. referred to *Donald* v. *Suckling.* (4)]

And it is submitted that a mortgagee of shares has a similar implied power of sale. By a mortgage (as distinguished from a pledge) the property passes to the mortgagee.

(1) (1870) L. R. 10 Eq. 641, 647.
(2) 18 Q. B. D. 222, 233.
(3) (1886) 17 Q. B. D. 690, 698.
(4) (1866) L. R. 1 Q. B. 585.

[VAUGHAN WILLIAMS L.J. Must not the notice say in effect, "If you do not pay the debt, I shall sell the shares"?]

If that is necessary, the defendants' letter of August 31, 1897, which has never been withdrawn, was sufficient.

[VAUGHAN WILLIAMS L.J. If the pledgee repudiates the pledge, has he still a legal right to sell?]

Henderson v. *Astwood* (1), in the Privy Council, shews that he has. That case establishes (1.) that mere lapse of time will not prevent the exercise of a power of sale in a mortgage; (2.) that the fact that the mortgagee has by words or conduct represented that the equity of redemption is at an end will not prevent him from exercising the power of sale. A mortgagee who sells in the belief that he is the absolute owner of the property may yet thereby exercise his power of sale. A mortgagee is not to be converted into an absolute owner to his own detriment merely because he has made an honest mistake. That was the basis of the decision in *Henderson* v. *Astwood*. (1)

[VAUGHAN WILLIAMS L.J. Your proposition is that, if an act can be justified under a power, it will not be rendered invalid because the actor thought that he was doing the act under a different title?]

Yes. It was natural for the defendants to say they had no security, when the shares were at that time almost worthless. There is no estoppel against the defendants.

An argument also took place on the question of the measure of damages, in case the Court should consider that the plaintiff was entitled to damages for the sale of the shares. It is considered unnecessary to report this part of the argument, because in the result the Court had not to decide the question.

The following authorities were cited upon the point: *In re Ottos Kopje Diamond Mines* (2); Mayne on Damages, 6th ed. p. 402; *Michael* v. *Hart & Co.* (3); *Greening* v. *Wilkinson* (4); *Ewbank* v. *Nutting* (5); *Halliday* v. *Holgate* (6); *Johnson*

(1) [1894] A. C. 150.
(2) [1893] 1 Ch. 618, 621, 626.
(3) [1901] 2 K. B. 867; [1902] 1 K. B. 482.
(4) (1825) 1 C. & P. 625; 28 R. R. 790.
(5) (1849) 7 C. B. 797.
(6) (1868) L. R. 3 Ex. 299.

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & CO.

v. *Stear* (1); *Miller* v. *Dell* (2); *Jennings* v. *Broughton* (3); *Martin* v. *Porter* (4); *In re Bahia and San Francisco Ry. Co.* (5); *Owen* v. *Routh* (6); *M'Arthur* v. *Lord Seaforth.* (7) *Stutfield*, in reply, referred on the question of damages to *Hochster* v. *De la Tour* (8); *Frost* v. *Knight.* (9)

Cur. adv. vult.

March 1. VAUGHAN WILLIAMS L.J. read the following judgment:—The main question in this case is, whether the sale by the defendants of these shares in March, 1899, is a sale within their power. There may be some doubt as to whether the defendants were, strictly speaking, mortgagees; but, as both sides argued the case before us on the assumption that the defendants were mortgagees, I shall deal with the case on that assumption. The plaintiff in his statement of claim so asserted, and, although the defendants by the form of their pleading denied this allegation, yet, in the argument before us and in the Court below, the counsel for the defendants, with the assent of the counsel for the plaintiff, withdrew this denial. Now, the defendants, being mortgagees, have in equity, notwithstanding their legal title to the shares, no estate sufficient to enable them to sell, and thus exclude the mortgagor from his equitable right to redeem, unless there is either an express or an implied power of sale in the mortgage. In the present case there is no express power of sale, and we have, therefore, to ascertain whether or not there is, in the circumstances of this case, an implied power of sale. I wish at once to say that I do not think that the circumstances which will give rise to an implication of a power of sale in favour of a mortgagee of a chattel, or even of stock or shares, can differ in favour of the mortgagee from those which are necessary to give a right of sale to a pledgee. In both cases the creditor holding security is allowed, as against the debtor in default, to enlarge his interest or estate. In the case of a pledge, whether of chattels

(1) (1863) 15 C. B. (N.S.) 330.
(2) [1891] 1 Q. B. 468.
(3) (1854) 5 D. M. & G. 126.
(4) (1839) 5 M. & W. 351.
(5) (1868) L. R. 3 Q. B. 584.
(6) (1854) 23 L. J. (C.P.) 105.
(7) (1810) 2 Taunt. 257; 11 R. R. 559.
(8) (1853) 2 E. & B. 678.
(9) (1872) L. R. 7 Ex. 111.

or of stock or shares, a power of sale is implied at law if a day is fixed by the contract for the payment of the debt; for in such a case it is inferred that the contract between the parties is that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the thing pledged. In the case of a mortgage in which there is a fixed day for payment and default in payment, a similar power of sale would seem to arise, if not in the case of a mortgage of a chattel, at all events in the case of a mortgage of stock or shares. This seems established by *Tucker* v. *Wilson*. (1) In the present case no day is fixed for payment by the original contract. Now, in the case of a pledge at law, it would seem to be fairly well established that, when a loan is for an indefinite time, the lender may terminate the credit by giving notice to the debtor to pay on a certain day, and that upon default in payment on that day the pledgee may sell the pledge; but I know of no case in which the power of sale of a pledge has been held to arise in a case where no day has been fixed by the creditor for payment; and I know of no reason or authority for the proposition that a power to sell should arise in a case of a mortgage of stock unless a day certain has been fixed for the payment. So far I have dealt only with the law apart from the Conveyancing Act, 1881. Sects. 19 and 20 of that Act do not apply to the present case, because the mortgage was not by deed; and, even assuming that the so-called notice in the present case would have been, in the case of a deed, a notice requiring payment of the mortgage money served on the mortgagor, and assuming that there would have been default in payment for three months after such service—all of which assumptions I doubt—I yet think that the presence of these provisions in the Conveyancing Act would not justify us in departing from the law as it appeared to be established before the passing of that Act.

Let me now consider the reason for requiring a notice as a condition of the implied power of sale. It may be said that the object of the notice is to put the mortgagor in default, and that it is this which is, in essence, the condition of the

(1) 1 P. Wms. 261; 5 Bro. P. C. 193.

C. A. 1902

DEVERGES v. SANDEMAN, CLARK & Co.

Vaughan Williams L.J.

power of sale. Perhaps so. But in what respect is the mortgagor to be in default before the pledge can be sold as against him? The debt is due, and an action could, ex hypothesi, be brought against him. Moreover, why is it that the notice must be "reasonable," as by all the authorities it must be? To my mind the answer is plain—to give the mortgagor a reasonable opportunity to redeem. In my judgment none of the letters in this case did give the mortgagor that opportunity. Of course he had the right to redeem whether or not a notice was given. This is not the opportunity intended to be given by a notice; there is nothing in the letters to put a certain end to the indefinite credit. There is nothing in the letters to lead the mortgagor to suppose that he must redeem by a definite day or suffer a sale of the pledge. On the contrary, the letters plainly tell him that the subject-matter of pledge has ceased to exist. It is unnecessary to look at any of the letters prior to the purchase of the last 300 shares, that is to say, prior to November, 1897. [His Lordship read the defendants' letter of May 31, 1898, and continued:—] The defendants are here waiting for instructions to sell, and certainly make no demand for immediate payment or for payment by a fixed date. Then comes the notice from the secretary of the company of the proposed reconstruction meeting, accompanied by the letter of June 13, 1898, from the defendants. This is followed by a notice from the liquidators of August 16, together with the letter from the defendants of August 22. It seems to me that up to this date there is nothing in the letters of the defendants making such a demand as to raise an implied power of sale in case the mortgagor, the plaintiff, should not comply with it. On the contrary, the letters ask for instructions to sell, or for money to take up the substituted shares in the new company; and when we look at the letter of August 22, we find in it a statement that, unless the plaintiff accepts the new shares, with the liability on them, his shares will be forfeited. It seems to me impossible that anything in this letter, containing that misstatement as to the mortgagor's position, can operate to raise an implied power of sale. The mortgagor might have been willing and

able to redeem, if he had known that he could, as a dissentient shareholder, have insisted on being paid out at the then value of the shares. This, in my judgment, brings the case within the principle of *Pigot* v. *Cubley* (1), in which a misstatement by the pledgee in his claim of the amount due prevented the implied power of sale arising, and made the sale wrongful. The letter written by the plaintiff's clerk on September 3, 1898, should really have suggested to the defendants what the true state of the case was; it certainly does not speak of a power of sale. The misrepresentation as to the security being forfeited, if the shares in the new company were not taken up, and the view of the defendants that they were entitled to treat themselves as unsecured creditors, although they in fact exchanged the shares for shares in the new company, continued until the sale of the new shares in March, 1899. Moreover, in the account sent with the demand for payment in October, 1898, at a time when the 1050 shares were still unsold, but when the 700 shares had been surrendered, there is a misrepresentation in effect by omission, bringing the case within the principle of *Pigot* v. *Cubley*. (1) The mortgagor was entitled, when he knew of the surrender of the old for the new shares, to elect to take the new shares, but he was not bound so to do; and until he did so the position was that the mortgagees had realized the old shares by surrender and were bound to give credit for their value. I am inclined to think that, even if there had been such notice and default as to raise an implied power of sale prior to the taking up of the new shares by the mortgagees in September, the power of sale would not have continued and extended to the new shares which the mortgagor had no opportunity of redeeming; but this is unimportant, as I am clearly of opinion that there never was such notice and default as to raise an implied power of sale either by the letter of May 31 or by any letter subsequent to it; and that no notice is material prior to the date of the purchase of the last 300 of the 700 shares.

It follows that, in my opinion, the sale of the 1050 shares substituted as security for the 700 was wrongful, and that

(1) (1864) 15 C. B. (N.S.) 701.

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & Co. Vaughan Williams L.J.

the plaintiff is entitled to damages; but I think that those damages must be limited to the price realized by the shares, less the amount due to the defendants for principal, interest, and proper charges; but, as the 55*l.* brought into Court was not sufficient to cover the plaintiff's claim, I think that the plaintiff is entitled to judgment, with costs. The order of Farwell J. as to costs is based on the assumption that the defendants were entitled to sell. Perhaps I ought to add that the reason why I think, notwithstanding the decision of Wills J. in *Michael* v. *Hart & Co.* (1), that the damages in this case must be limited to the value of the shares at the date of the wrongful sale, and do not extend to the highest value between the wrongful sale and the trial, is that the circumstances of the present case do not bring it within that decision, assuming it to be right. In the present case the evidence shews that the plaintiff was never in a position to redeem the shares until the sale; and it is the merest speculation to assume that he would have kept the shares till May (the time of the highest price) and then sold out, especially as the mortgagees could by notice have compelled him to redeem or have the shares sold. As both my learned brethren have arrived at a different conclusion, the appeal must be dismissed, with costs.

STIRLING L.J. read the following judgment:—This case was decided in the Court of first instance, and has been argued in this Court, on the basis that the relation between the plaintiff and the defendants was that of mortgagor and mortgagee; and I think that it must now be dealt with on that footing. I agree with Farwell J. in thinking that the statement of the law at p. 276 of vol. i. of Robbins on Mortgages is correct. The passage is as follows: "If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure." This, however, leaves open the question, What are the rights

(1) [1901] 2 K. B. 867.

of the mortgagee when no day has been appointed for payment? And I have nowhere found any authoritative statement of the law on this head. Some light may be derived from what has been said by learned judges as to the rights of a pawnee or pledgee of chattels in like circumstances. Thus Bowen L.J. said in *Ex parte Hubbard* (1): "There is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee." In *In re Morritt* (2) Cotton L.J. said: "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale." He afterwards said (3), with reference to the position of a mortgagee of personal chattels: "Where there is no express power of sale given by the mortgage, he has, after default in payment, and after he has given the mortgagor a reasonable time to pay the money due, a power to sell and give a good title to the purchaser, though, of course, the mortgagor has, at any time before sale, a right on payment of the money due, including expenses, to prevent the sale and redeem the chattels." According to those authorities it would seem to me that when no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mortgagor, and default must be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case. A notice demanding payment of an excessive sum has been held to be bad: *Pigot* v. *Cubley*. (4) The notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage; and I think it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the

(1) 17 Q. B. D. 698.
(2) 18 Q. B. D. 232.
(3) 18 Q. B. D. 233.
(4) 15 C. B. (N.S.) 701.

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & Co. Stirling L.J.

mortgagor that, if he fails to avail himself of the opportunity given to redeem, the mortgagee will be in a position to put in force his rights.

The transaction between the plaintiff and the defendants commenced with a purchase of 400 shares on July 13 for July 29, 1897. The plaintiff remitted to the defendants a part only of the purchase-money, and the shares were transferred to and registered in the names of two of the defendants. On August 31, 1897, the defendants wrote to the plaintiff. [His Lordship read the letter, and continued :—]

By a letter dated October 12, 1897, inclosing a cheque for 50*l.*, the plaintiff acknowledged the receipt of this letter of August 31, and excused himself for not having sent money to the defendants; but he raised no objection to the exercise of the right claimed by them. I think that he thereby gave his assent to the defendants' continuing to hold the shares on the terms stated in that letter, and that, on non-payment by him on September 15, 1897, of the amount then due to the defendants, the defendants became entitled to sell those 400 shares. Subsequently to the last mentioned date, further purchases of shares, amounting to 300 in all, were made by the defendants on behalf of the plaintiff, who again remitted to them part only of the purchase-money; and these shares were transferred and registered in the same way as the original 400. The last of these purchases was made on November 11, 1897. [His Lordship then referred to the defendants' letter of May 31, 1898, the reconstruction scheme, and the defendants' letter of June 13, 1898, and read their letter of August 22, 1898, and continued :—]

I think that, when fairly construed, that letter amounted to notice to the plaintiff that, unless he should by September 9 remit to the defendants the amount of his indebtedness to them in respect of the shares, and also the amount which would become payable on the new shares, the defendants would deem themselves at liberty to enforce payment of the debt. [His Lordship then referred to the subsequent correspondence, and continued :—]

We were invited by the learned counsel for the defendants

to hold that the letter of August 22, 1898 (if no other letter), was such a notice as entitled them to sell the shares, and I have come to the conclusion that it was. It fixed a day for payment—namely, September 9, 1898. The period between the date of the letter and the day fixed for payment is two days longer than the period fixed by the letter of August 31, 1897, which was assented to by the plaintiff, and was, I think, perfectly reasonable, both in itself and also when regard is had to the preceding correspondence. It also clearly intimated to the plaintiff that, if he failed to comply with the terms of it, the defendants would proceed to enforce their rights. It is said that this letter contained such misrepresentations as to invalidate it as a notice. These are, first, that the defendants speak of the shares as liable to forfeiture in the event of the plaintiff not assenting to the scheme; and, secondly, that they describe themselves as unprotected by any security. Literally, no doubt, these statements are incorrect. If the plaintiff did not assent to the scheme, he would have been entitled to receive the value of his shares, which was ascertained to be a little over 1*s.* per share. The defendants had a security, and, if they had sold the old shares in the market, they would have obtained in the market about the same sum per share. Although in these respects the letter is not strictly accurate, I think that the statements contained in it are substantially correct, and that it was not invalidated as a notice by any inaccuracies in it. There was no misleading of the plaintiff. His letters shew that he was impecunious, and the sum of about 30*l.* would not have enabled him to pay a debt of over 500*l.* The subsequent correspondence extended the time for payment to September 24, and it does not seem to me that the subsequent letters of October 3 and November 16, written by the defendants, deprived them of any right which they had thus acquired. I say this because, as I understand, the learned judge, who heard the case and saw the witnesses, has found as a fact that the defendants, although they made a serious and regrettable mistake as to their legal position, nevertheless acted in good faith, believing themselves to be owners of the shares substituted for those originally bought. In my judgment the defendants had, under the letter of

C. A. 1902 — DEVERGES v. SANDEMAN, CLARK & Co. — Stirling L.J.

August 22, 1898, power to sell all the 700 shares at any time after September 24, 1898; and also, as regards the first 400 shares, the power derived from the letter of August 31, 1897. Both these powers were available over the new shares substituted for them respectively. I do not think that the fact found by Farwell J., that the defendants sold bonâ fide, believing themselves to be absolute owners, precludes them from defending themselves on the ground of a power of sale which they were entitled to exercise; and I think that *Henderson* v. *Astwood* (1) is an authority in support of that view. In my opinion, the judgment of Farwell J. was right, and the appeal ought to be dismissed.

COZENS-HARDY L.J. The difference of opinion between my two colleagues has made me approach this case with anxiety; but, after mature consideration, I think the judgment of Farwell J. was correct and ought to be affirmed. The plaintiff alleges in his statement of claim that the 700 shares, which were purchased for him by the defendants, acting as his brokers, were, in accordance with a verbal arrangement between him and them, transferred into the names of two members of the defendants' firm "by way of mortgage to secure the sum so due from the plaintiff." This allegation was not admitted by the statement of defence, but it was admitted before Farwell J., and the argument before us has proceeded on that footing. Assuming the true relation between the parties to be that of mortgagor and mortgagees of shares, I think it is settled law—vide *Tucker* v. *Wilson* (2)—that the mortgagees have a power of sale, provided that a reasonable time has elapsed after notice requiring payment. The notice need not state that the mortgagees will sell; it is sufficient that the notice requires payment of the mortgage money. On this point s. 20 of the Conveyancing Act, 1881, may be referred to. It clearly expresses that which is implied when judges speak of the necessity of reasonable notice, without saying what the notice should comprise. Now, in the present case, I think the letters of April 6, 1898; May 31, 1898; June 13, 1898; August 22, 1898; September 9, 1898; and September 16, 1898,

(1) [1894] A. C. 150. (2) 1 P. Wms. 261.

were, both separately and collectively, good notices requiring payment of the mortgage debt. I do not rely upon the letter of August 31, 1897, because at that date only 400 shares had been purchased; and the letter could only have relation to those 400 shares. No time being originally fixed for payment of the mortgage debt, it was payable on demand; and each and all of the letters I have referred to must be regarded as a demand for payment. It is true that in *Tucker* v. *Wilson* (1) there was a definite time fixed originally for payment; but, in my opinion, that was not essential to the decision. The position of a mortgagee is at least as good as, and I think in some respects better than, the position of a pawnee. In *In re Richardson* (2) Fry L.J. states the law as follows (3): "The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed, if there be a time fixed, or in default of payment after reasonable notice if no time be fixed." And in *Ex parte Hubbard* (4) Bowen L.J. uses similar language (5): "In all such cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee." I may observe that the letters to which I have referred, with one exception, do not contain any statement, accurate or inaccurate, as to the amount due; but, although a mistake as to the amount due may destroy the effect of the notice, as between pledgor and pledgee—*Pigot* v. *Cubley* (6)—I think that is not the law as between mortgagor and mortgagee. In order to restrain a mortgagee from selling, in the absence of fraud, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into court, or tender to the mortgagee, the amount claimed to be due. Having regard to the nature of the property, a fortnight, or at the outside a month, would in the present case be a reasonable time. If, therefore, the defendants had sold the 700 shares in February and March, 1899, I should have felt no difficulty in the case. But some difficulty is occasioned by the fact that the 700 shares have

(1) 1 P. Wms. 261.
(2) (1885) 30 Ch. D. 396.
(3) Ibid. 403.
(4) 17 Q. B. D. 690.
(5) Ibid. 698.
(6) 15 C. B. (N.S.) 701.

C. A. 1902 DEVERGES v. SANDEMAN, CLARK & Co. Cozens-Hardy L.J.

ceased to exist, and that under a so-called reconstruction scheme the defendants applied for and obtained an allotment of 1050 shares in a new company in respect of these 700 shares, and that they were foolish enough to fancy that they could claim the benefit of those shares as their own property not subject to any rights of the plaintiff, and that they sold those new shares in February and March, 1899, not as mortgagees, but as absolute owners. Now it is clear that those 1050 new shares were as much subject to the mortgage as the original 700 shares. It is precisely similar to the case of a renewed lease granted to a mortgagee. This is the plaintiff's allegation. It follows that the substituted property is subject to the same power of sale as the old property was subject to. Nor can I see that it makes any difference that the defendants sold under the belief that they were no longer mortgagees. Farwell J. has found that they were not fraudulent; and, this being so, if authority is wanted, I think the decision in the Privy Council in *Henderson* v. *Astwood* (1) suffices to shew that the sales in February and March, 1899, may be supported as sales under their power as mortgagees.

I cannot help expressing my regret at the conclusion at which I have arrived, because I am convinced that in fact the relation between the parties was not that of mortgagor and mortgagee. The plaintiff was in Spain, and the defendants were in London. The verbal arrangement pleaded is a mere fiction. The relation between the parties was simply that of client and brokers; and if the plaintiff had sued the defendants on that footing, as at present advised, I think he might have recovered damages for wrongful conversion. The rights of a broker, in respect of a broker's lien, or under the rules of the Stock Exchange, are not the same as the rights of a mortgagee under an express contract of mortgage. In the view which I take it is unnecessary to consider what would have been the proper measure of damages if the conversion of the shares had been wrongful.

Solicitors: *E. F. Weldon; Morley, Shirreff & Co.*

(1) [1894] A. C. 150.

W. L. C.

In re HANDMAN AND WILCOX'S CONTRACT.

C. A. 1901 BUCKLEY J. *Feb.* 8. C. A. 1902 *Jan.* 24, 27, 28; *Feb.* 17.

[1900 H. 3963.]

Settled Land—Lease—Void or Voidable—"Best Rent"—Collusive Bargain for Reduction of Rent—Purchaser for Value without Notice—Doubtful Title—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 7, *sub-s.* 2; *s.* 54.

A tenant for life, purporting to act under the powers of the Settled Land Act, 1882, granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, and the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, and the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, and the purchaser objected that, having regard to the amount of the price, it must be shewn that the rent reserved by the lease was the best that could reasonably be obtained within s. 7, sub-s. 2, of the Settled Land Act. The vendor had no knowledge of the arrangement between the lessor and the lessee as to the reduction of the rent, and he insisted that, as purchaser for value without notice, he could make a good title to the purchaser:—

Held, by Buckley J., that, inasmuch as the lease did not comply with the statutory requirements as to rent, and the lessee did not act in good faith within s. 54, it was bad, and could be set aside as against a purchaser for value without notice:

Held, by the Court of Appeal, on the authority of *Freer* v. *Hesse*, (1853) 4 D. M. & G. 495, that, assuming that the lease was voidable only and not void, the title was not such as ought to be forced upon the purchaser, since it depended on a doubtful question of fact, namely, whether his predecessor in title, the vendor, purchased without notice of the defect in the title.

THIS was a purchaser's summons under the Vendor and Purchaser Act, 1874.

In 1894 a building lease of some vacant land in the Western Road, Ealing, was granted by G. Haynes, as tenant for life under the powers of the Settled Land Act, 1882, to W. Nye for a term of ninety-nine years at a rent of 4*l.*, the lessee covenanting, within the space of six months from the date of the lease, to erect thereon a meeting-room at the cost of 200*l.* at least. The lessee did not perform the covenant to build, and eventually became bankrupt; and in October, 1900, his

C. A. 1902

HANDMAN AND WILCOX'S CONTRACT, *In re.*

trustee in bankruptcy sold the lease by auction to C. Handman for 150*l.*

In July, 1900, Handman agreed to sell the property to G. J. Wilcox for 195*l.*, and Wilcox paid a deposit of 20*l.* Wilcox made the following requisition: "Having regard to the fact that the lease is now sold for 195*l.*, it must be shewn that the rent reserved was the best rent that could reasonably be obtained."

Handman failed to comply with this requisition, and this summons was then taken out by Wilcox, asking for a declaration that the requisitions had not been sufficiently answered, and that a good title to the premises had not been shewn in accordance with the contract, and for a return of the deposit.

It appeared from the evidence, which was conflicting, that the lease was granted at less than the best rent that could reasonably be obtained, the lessor having accepted the reduced rent of 4*l.* in consideration of the waiver by the lessee of a personal claim for damages against him. It further appeared from an affidavit filed by Handman, and this was not contradicted, that he had no knowledge of the above facts, and he set up the plea of purchaser for value without notice as an answer to the objection as to the inadequacy of the rent.

The summons was heard before Buckley J. on February 8, 1901.

E. Clayton, for the purchaser. The lease was granted by a tenant for life under the powers of the Settled Land Act, 1882, and the best rent that could reasonably be obtained was not reserved as directed by s. 7, sub-s. 2. A tenant for life is treated as a trustee for all parties (s. 53), and cannot take a premium. The lease is therefore void: *Chandler* v. *Bradley*. (1) This was not a fair dealing in good faith as between lessor and lessee, so as to be protected by s. 54 and be binding on the remaindermen; it is at least voidable, and may be set aside at the instance of the remaindermen: *Chandler* v. *Bradley*. (2) Such a title is too doubtful to be forced on a purchaser: *In re New Land Development Association and Gray*. (3)

(1) [1897] 1 Ch. 315. (2) [1897] 1 Ch. 323. (3) [1892] 2 Ch. 138.

Stewart-Smith, for the vendor. We are purchasers for value without notice, and have the legal estate.

[BUCKLEY J. It is a voidable transaction, and can be set aside at the instance of the beneficiaries. How can they be estopped? It is on the face of it a statutory lease, and you bought with knowledge of the provisions under which it was made.]

We have got the legal estate without notice, and the fact that the lease may be set aside cannot affect us. In order to affect us notice must be actual, not constructive: Farwell on Powers, 2nd ed. p. 429; *Green* v. *Pulsford* (1); *M'Queen* v. *Farquhar*. (2)

Under s. 54 of the Settled Land Act, 1882, the lease itself is good as between lessor and lessee and cannot be impugned; it cannot be that a purchaser from the lessee is in a worse position than the lessee himself.

[BUCKLEY J. The effect of s. 54 is that a lease is good if the parties bonâ fide agreed that the rent was a proper one. That does not apply to make the lease good by a subsequent transfer where the rent was insufficient and the lease bad.]

The beneficiaries are protected by the notice which has to be given to the trustees. The lease is not voidable as against the transferee. Even if it is voidable, it is operative until set aside, and it passed the legal estate. The evidence shews that the best rent was reserved within the rule laid down in *Doe* v. *Radcliffe*. (3)

BUCKLEY J. referred to the lease and to s. 7, sub-s. 2, of the Settled Land Act, 1882, and continued:—The purchaser says that in point of fact the best rent was not obtained. If that was the case s. 54 has, in my opinion, no application to the present case. [His Lordship read s. 54.] The section applies only to the grant of a lease, and has no application to the time when a subsequent transfer is made. The lease having been granted, it was put up for sale by auction; Handman bought it, and the

(1) (1839) 2 Beav. 70; 50 R. R. 102.

(2) (1805) 11 Ves. 467; 8 R. R. 212.

(3) (1808) 10 East, 278; 10 R. R. 295.

C. A. 1902 HANDMAN AND WILCOX'S CONTRACT, *In re.* Buckley J.

lessee's trustee in bankruptcy assigned it to Handman. Handman says he took it without any notice that it had been granted at a rent which was not the best rent. He now argues that that is a defence for him on this summons. In my opinion that is not a defence. The lease being a statutory lease under a power to grant leases at the best rent, if the fact was that it was not granted at the best rent, and the lessee was not acting in good faith within s. 54, the lease was bad; and that objection is open at the instance of the beneficiaries, not only against the original lessee, but also against his transferees who have acquired the lease without notice of the defect. If the lease was not granted for the best rent it is voidable, and the beneficiaries can say so against the transferees as well as against the original lessee. Otherwise the lease might go on during the life of the tenant for life, and when the remaindermen came into possession they would be told that although the tenant for life had granted a lease which was not for the best rent and was therefore bad, yet the property had so changed hands that they could not recover it. There remains only a question of fact.

[His Lordship dealt with the evidence, and came to the conclusion that the lease was not a good lease within the statute, and the purchaser was not bound by the contract.]

H. C. R.

C. A.

Handman appealed from this decision. The appeal came on for hearing on January 24, 1902.

Vernon Smith, K.C., and *Stewart-Smith*, for Handman. Handman purchased in the open market a term of ninety-nine years, apparently validly created by a tenant for life under the Settled Land Act, 1882. He thus got the legal estate in the term, and, being himself a bonâ fide purchaser without notice of any defect in the title, he could hand on that legal estate to a purchaser from him even though that purchaser had notice of the defect.

[COZENS-HARDY L.J. Under sub-s. 5 of s. 7, "a statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation

under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated." Was there any such statement in this case as to this rent being the best rent?]

No. A tenant for life who grants a lease under the Act does, in fact, thereby pass the legal estate whether he reserves the best rent or not; just as, if he sells or makes an exchange under ss. 3 and 4, he passes the legal estate whether he obtains the "best price" or "best consideration" or not. It cannot, therefore, be said that the lessee of the term gets nothing merely because it may subsequently turn out, perhaps years afterwards, that the rent reserved may not have been the "best rent." The object of the Act is to protect the title of a lessee dealing in good faith with the tenant for life: *Mogridge* v. *Clapp*. (1) See also s. 45, sub-s. 3, and s. 54 of the Act.

[COZENS-HARDY L.J. *Dowager Duchess of Sutherland* v. *Duke of Sutherland* (2) seems somewhat in point.]

In that case the leases were held to be invalid because they were not made in good faith. But it is there distinctly stated (3) that the Court would be reluctant to allow a lease to be impeached merely on the ground of inadequacy of rent, where the lease was granted in good faith; and there is no evidence in the present case that the lease was not granted in good faith.

[STIRLING L.J. I had to consider this point in *Chandler* v. *Bradley* (4), where I decided that a lease under the Act by a tenant for life was void as against the trustees of the instrument by which the property was settled on the ground that, having regard to a bribe given by the lessee to the tenant for life as an inducement to grant the lease, the "best rent" had not been obtained, but the question whether the lease was void or voidable was not argued.]

In that case the action was brought against the original lessee, and there also bad faith was found as a fact. In *Mogridge* v. *Clapp* (1) Lindley L.J. expressed an opinion to the effect that, even if there had been a want of good faith on the part of a person dealing with a tenant for life, still a purchaser

(1) [1892] 3 Ch. 382, 395.
(2) [1893] 3 Ch. 169.
(3) [1893] 3 Ch. 195.
(4) [1897] 1 Ch. 315.

C. A. 1902 HANDMAN AND WILCOX'S CONTRACT, *In re.*

without notice from that person would be protected. Sect. 53, which provides that the tenant for life shall be deemed to be a trustee for the parties interested, does not impose a condition which affects the title, but relates to the personal liability of the tenant for life: *In re Marquis of Ailesbury's Settled Estates* (1), per Lindley and Fry L.JJ. Sect. 54 protects a bonâ fide purchaser or lessee, and at any rate a purchaser from the original purchaser or lessee is protected. The effect of those sections is that the tenant for life himself would be liable for his breach of trust, but a bonâ fide purchaser from him is protected. Assuming that the best rent was not obtained, there is no evidence of any want of good faith on the part of the lessee, for there is nothing to shew that he knew at the date of the bargain that the lessor was a limited owner. The mere fact that the lease was expressed to be made in exercise of the powers of the Settled Land Act is not conclusive upon this question. Good faith is a question of fact, and it is not negatived by proof of constructive notice.

[VAUGHAN WILLIAMS L.J. referred to *In re Chawner's Settled Estates* (2) as to what constitutes best rent.]

As to the meaning of good faith within s. 54, see *Mogridge* v. *Clapp* (3), per Kekewich J. Cases under the Settled Estates Act, 1877, do not apply, for by s. 4 of that Act, and probably also by s. 46, the requirements as to leases are made conditions precedent to the granting of a lease.

Micklem, *K.C.*, and *E. Clayton*, for Wilcox. Sub-ss. 1, 2, and 3 of s. 7 provide definitely what a lease by a tenant for life must contain. They are the conditions on which alone a lease can be granted, and no lease under the Act can be valid unless those conditions are fulfilled. This is a statutory power, and primâ facie, if the terms of the power are not complied with, the legal estate does not pass. Assuming the provisions of s. 7 were inserted in a settlement, it is clear that a lease which did not comply with those conditions would be void, and no estate would pass. This lease was granted at an undervalue in pursuance of an arrangement between the lessor and

(1) [1892] 1 Ch. 506, 536, 545. (2) [1892] 2 Ch. 192.
(3) [1892] 3 Ch. 382, 391.

lessee, and this is not a defect which the Court could have remedied under the Leases Act, 1849 (12 & 13 Vict. c. 26): see Farwell on Powers, 2nd ed. pp. 343, 345; *Moffett* v. *Lord Gough*. (1)

[COZENS-HARDY L.J. referred to s. 20, sub-s. 2, of the Settled Land Act.]

That section does not apply to this case.

[STIRLING L.J. referred to s. 54.]

That section is limited to the case of parties acting in good faith. Where the parties on both sides agree for an extraneous consideration that a reduced rent shall be accepted, that is not acting in good faith within the section.

In *Mogridge* v. *Clapp* (2) Kay L.J. expressed his opinion that a lease which did not comply with the requirements of s. 7 would be void, although there is no express enactment to that effect, following the analogy of leases granted under powers in a settlement; and see also his observations as to the meaning of good faith under s. 54.

Assuming that the lease is voidable only and not void, we say that Handman is not a bonâ fide purchaser for value without notice. By s. 3, sub-s. 1 (i.), of the Conveyancing Act, 1882, the test of constructive notice is whether the fact in respect of which it is sought to impute notice would have come to the knowledge of the purchaser if such inquiries had been made as ought reasonably to have been made. In this case Handman knew all that Wilcox knew, and the facts which Wilcox knew, namely, that the price was excessive considering the amount of the rent and that the land had not been built on, were sufficient to lead him to discover the defect in the title.

[STIRLING L.J. referred to *Bailey* v. *Barnes*. (3)]

That was a different case, because a mortgagee may sell at a forced sale and at the best price to suit his own interest; but a tenant for life who sells or lets in exercise of the powers of the Settled Land Act, 1882, is a trustee for all the parties interested.

(1) (1878) 1 L. R. Ir. 331. (2) [1892] 3 Ch. 382, 398.
(3) [1894] 1 Ch. 25.

C. A. 1902 HANDMAN AND WILCOX'S CONTRACT, *In re.*

At any rate, this is not a title which ought to be forced upon a purchaser. This title depends upon a question of fact which may be controverted by persons who are not parties to these proceedings, and would not be bound by the judgment of the Court. If the remaindermen attacked Wilcox, he would have to prove that though he had notice of the defect in the title his predecessor had not. That is a doubt which does not turn upon the construction of an Act of Parliament, but upon a question of fact, and the Court will not force upon a purchaser a title depending upon a doubtful question of fact: *In re Briggs and Spicer.* (1)

[STIRLING L.J. That case was decided upon the view that the word "void" in s. 47 of the Bankruptcy Act, 1883, meant void; but subsequently the Court of Appeal took a different view of the construction of that section in *In re Carter and Kenderdine's Contract.* (2)]

That does not affect the question for which it is now cited; and see *In re New Land Development Association and Gray.* (3)

Vernon Smith, K.C., in reply. The provisions of s. 7 are not in the nature of conditions essential to the validity of the lease, but the tenant for life is liable for the non-observance of them, and every one claiming through him with notice. The legal estate passes, notwithstanding this collusive bargain between the tenant for life and the lessee. It was at most a voidable transaction. To hold the contrary would be to defeat the policy of the Act, which was to make land more marketable.

[COZENS-HARDY L.J. referred to *Freer* v. *Hesse* (4) upon the question of doubtful title.]

That is hardly consistent with *Mogridge* v. *Clapp.* (5) Practically there is no real risk to the purchaser. There must be something like threatened or apprehended litigation, or a reasonable probability of litigation.

Cur. adv. vult.

(1) [1891] 2 Ch. 127.
(2) [1897] 1 Ch. 776.
(3) [1892] 2 Ch. 138.
(4) 4 D. M. & G. 495.
(5) [1892] 3 Ch. 382.

C. A. 1902 HANDMAN AND WILCOX'S CONTRACT, *In re.*

Feb. 17. VAUGHAN WILLIAMS L.J. This is an appeal from a decision of Buckley J. The question is raised on a summons under the Vendor and Purchaser Act, 1874. The question is whether the vendor has made such a title as can be forced upon the purchaser. The material facts are that a tenant for life under the powers of the Settled Land Act, 1882, granted to a lessee a building lease for ninety-nine years at a rent less than the best rent that could reasonably be obtained, and this was done with the knowledge, as appears from the evidence, both of the tenant for life and of the lessee. The lessee covenanted for the erection of a house at the cost of 200*l.*, and he did not erect the house, but after a few years became bankrupt. His trustee in bankruptcy sold the lease, and the present vendor purchased at the price of 150*l.* That was a very substantial price when one considers that the rent reserved was only 4*l.*—a price which, to my mind, would have been a much more likely commercial price in case the rent reserved had been what it ought to have been. It may very well be that the purchaser had no means of knowing this, and did not in fact know it, but we have not got really sufficient evidence to enable us to judge of that. Now he has entered into a contract for the sale of this lease, and the present purchaser declines to accept the title. The title is a doubtful title because there are really material facts which are in doubt. Those facts are such that not only is it theoretically possible that they may be put in issue, as was the case in *Mogridge* v. *Clapp* (1), and as was pointed out by Lindley L.J., but it is extremely probable that the validity of this lease may be hereafter questioned by those who are entitled in remainder, and the success of that question may depend upon facts which are too much in doubt to make it right to force the title on the purchaser. In these circumstances, we think that the decision of Buckley J. must be affirmed, and the appeal dismissed.

STIRLING L.J. In this case I take the same view of the facts as Buckley J. I think that on the evidence as it now stands it must be taken that the lease which is the subject-matter of

(1) [1892] 3 Ch. 382.

C. A 1902 HANDMAN AND WILCOX' CONTRACT, *In re.* Stirling L.J.

the contract was granted, not merely in consideration of the annual rent of 4*l.* thereby reserved, but of the abandonment by the lessee of a money claim against the lessor personally. The lease was granted by the lessor under the powers conferred by the Settled Land Acts; and this, I think, the lessee must be taken to have known. In my opinion, therefore, the lessee did not reserve the best rent that could be obtained, and the lessee did not act in good faith within the meaning of s. 54 of the Settled Land Act, 1882. It follows that the lease was either void or voidable as against the parties entitled under the settlement other than the lessor. If the lease was void, as the purchaser contends, then the title of the vendor is bad. If the lease was voidable only, as is contended on behalf of the vendor, then the title might be supported on the ground that the vendor was a purchaser for value without notice. It was, however, decided by the Court of Appeal in Chancery in *Freer* v. *Hesse* (1) that a title the validity or invalidity of which depends on the question of fact whether a particular person had or had not notice ought not to be forced on a purchaser, and from that decision I do not see my way to depart. On these grounds I am of opinion that the appeal ought to be dismissed.

COZENS-HARDY L.J. This appeal raises questions of difficulty and importance as to the true effect of the Settled Land Act. [His Lordship stated the undisputed facts, and continued as follows:—]

It appears from the evidence, as Buckley J. has found, that the lease was granted by Haynes to Nye, not at the best rent, but at a reduced rent, in consideration of the waiver by Nye of a claim for damages against Haynes. I entirely adopt Buckley J.'s view of the evidence in this respect. But it is said that Handman was not aware of this arrangement, and that although the lease might not be good in the hands of Nye or of any one claiming through him with notice of the defect, it is good in favour of Handman as a purchaser for value without notice, and that he can pass it on to Wilcox.

(1) 4 D. M. & G. 495.

Now two points arise for consideration: (1.) Is the lease void or only voidable? (2.) Is the title such as ought to be forced upon a purchaser?

Having regard to the view which I take on the second question, it is not necessary—and perhaps not desirable—that I should state the conclusion at which I have arrived on the first point. Assuming in favour of the vendor that the lease is only voidable and not void, I do not think the title such as ought to be forced upon a purchaser. In that view everything would depend upon whether Handman had notice of the defect. In *Freer* v. *Hesse* (1) Knight Bruce L.J. says: "No doubt generally speaking, if not universally, a purchaser with notice from a vendor without notice is entitled to the same protection as the vendor was entitled to; but this is a question not between incumbrancers claiming rights against the estate: it is one arising in a suit for specific performance between the person in possession, who wishes to sell the estate, and the person to whom he wishes to sell it, and the safety of the title depends for this purpose on the point whether the vendor had notice of the incumbrance. The vendor says that he had not. His agents say they had not. This is, perhaps, true; but I am not aware of any instance, and counsel have not been able to supply any to the Court, of a title depending upon such a fact being forced on a purchaser." I think that is still good law. I should not hesitate to force upon a purchaser a title depending upon the construction and effect of a general statute, even though my view differed from that of the Court below. A striking instance of this is furnished by *In re Carter and Kenderdine's Contract* (2), where the Court of Appeal compelled a purchaser to take a title which depended upon the true construction of s. 47 of the Bankruptcy Act, 1883, although Stirling J. in *In re Briggs and Spicer* (3) had held a title bad which depended upon precisely the same point. But different considerations apply where the title depends upon the proof of a fact, such as notice or want of notice. The decision of the Court in such a case, based upon the evidence before it, would

(1) 4 D. M. & G. 503. (2) [1897] 1 Ch. 776.
(3) [1891] 2 Ch. 127.

C. A. 1902 HANDMAN AND WILCOX'S CONTRACT, *In re.*

not be binding upon, or indeed in any way influence, the Court in a litigation between other parties where different evidence might be adduced. I am not satisfied that Handman might not be affected with notice of the defect. The result is that I think Buckley J.'s judgment is correct, and that the appeal must be dismissed with costs.

Solicitors: *S. L. MacAndrew; James Morley.*

H. B. H.

C. A. 1902 *Feb.* 20, 21.

OLIVER *v.* GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

[1900 O. 933.]

Principal and Agent—Bank of England—Transfer of Stock—Attorney—Innocent Misrepresentation — Implied Warranty of Authority — Change of Position — Forged Power — Attorney innocently acting under Forged Power—Liability of Agent—Third Party—Indemnity.

S., a stockbroker, produced to the Bank of England a power of attorney for the sale and transfer of Consols standing in the names of the plaintiff and another person, a solicitor, the form of power having been obtained in ordinary course from the bank by S. upon the instructions of the solicitor, who professed to act on behalf of the plaintiff as well as himself; but the plaintiff knew nothing of the matter. The power purported to be signed by both stockholders, and at the foot was the usual "demand to act" signed by S. Acting on that "demand," and in pursuance of their statutory duty, the bank allowed S. to execute the transfer in the bank books as "attorney" for the two stockholders. S. received the purchase-money under the power and paid it to the solicitor, who applied it to his own use. Subsequently it was discovered that the plaintiff's signature to the power had been forged, whereupon, in an action by the plaintiff against the bank, the latter were ordered to transfer to him the like sum of Consols, and also to pay to him all back dividends, together with the costs of the action. The bank then claimed indemnity as against S. under a third-party notice.

No blame was attributable either to S. or to the bank for what had happened:—

Held, that a warranty was to be implied as against S. of the authority upon which he "demanded" of the bank the performance of their statutory duty, and that this implied warranty rendered him liable to indemnify the bank.

The principle laid down in *Collen* v. *Wright*, (1857) 8 E. & B. 647, 657,

and the rule deduced therefrom by Lord Esher M.R. in *Firbank's Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54, 60, adopted and applied.

The above cases, and also *Low* v. *Bouverie*, [1891] 3 Ch. 82, discussed.

Decision of Kekewich J., [1901] 1 Ch. 652, affirmed.

The rule in *Collen* v. *Wright*, 8 E. & B. 647, 657, which is left untouched by *Derry* v. *Peek*, (1889) 14 App. Cas. 337, is not limited to a case where the person professing to have authority as an agent purports to make a contract on behalf of his alleged principal. It extends to any case where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority.

THIS was an appeal by Mr. W. J. Starkey, a third party to the action, from the judgment of Kekewich J. upon the third-party claim. (1)

The question argued on the appeal was whether the appellant, a stockbroker, was liable to indemnify the defendants, the Bank of England, against the result of the judgment pronounced against them in the Court below. (2)

The facts are fully stated in the report below; but, for the purposes of the present report, they may be shortly stated as follows:—

In December, 1897, Messrs. Starkey, Leveson & Cooke, a firm of stockbrokers, of which the appellant, Mr. Starkey, was a member, acting on the instructions of Frederick William Oliver, a solicitor, applied to the bank in the usual way for forms of powers of attorney from F. W. Oliver and his brother, the plaintiff, Edgar Oliver, to him, Starkey, and his partner, Leveson, to enable them to sell and transfer the sums of Consols and bank stock in question, which were then standing in the joint names of the two Olivers, and to receive the purchase-money. The forms were in due course issued to Mr. Starkey's firm, and sent by the firm to F. W. Oliver for execution. The powers were returned to Mr. Starkey's firm by F. W. Oliver, executed by F. W. Oliver himself, and purporting to be also executed by Edgar Oliver and to appoint Messrs. Starkey and Leveson as attorneys for the sale and transfer of the Consols and bank stock. At the foot of each power were the words "I demand to act by this letter of attorney,"

(1) [1901] 1 Ch. 652, 664. (2) [1901] 1 Ch. 652, 654.

C. A. 1902 OLIVER v. BANK OF ENGLAND.

followed by the signature of Mr. Starkey alone. The powers were then taken to the bank by Mr. Starkey, who was in due course allowed to transfer the Consols and bank stock as attorney for the two stockholders, the transfers being made and entered in the books of the bank in the usual way, and Mr. Starkey signing his name as "attorney" at the foot of each transfer. The proceeds of the sales were received by Mr. Starkey and paid over to F. W. Oliver (by cheque payable to his order alone), who, however, applied the money to his own use, the plaintiff, Edgar Oliver, being entirely ignorant of what had occurred.

In July, 1899, F. W. Oliver died, and then the plaintiff, Edgar Oliver, discovered that his signature to the powers of attorney had been forged. He then brought the present action against the bank to compel them to make good the loss, whereupon the bank issued a third-party notice against Mr. Starkey and his partners, Messrs. Leveson and Cooke, claiming indemnity.

At the trial the bank did not seriously contest their liability to the plaintiff, and Kekewich J. gave judgment against them for the sums of Consols and bank stock, with all back dividends, and costs.

Upon the hearing of the third-party claim, Kekewich J. made no order as against Messrs. Leveson and Cooke; but, with regard to Mr. Starkey, his Lordship, after stating that Mr. Starkey had acted in the honest belief that he had the authority of the principals in whose names he purported to act, and that it was a pure question of law which of two innocent parties, Mr. Starkey and the bank, was to suffer, said he felt bound to hold, upon the authority of *Collen* v. *Wright* (1) and *Firbank's Executors* v. *Humphreys* (2), that Mr. Starkey was liable to the bank upon an implied warranty, and thereupon made an order upon him to make good to the bank all that they had been ordered to pay to the plaintiff, Edgar Oliver.

Mr. Starkey appealed.

The appeal was heard on February 20 and 21, 1902.

(1) 8 E. & B. 647. (2) 18 Q. B. D. 54.

Sir R. T. Reid, K.C., *Upjohn, K.C.*, and *Stewart-Smith*, for the appellant. This is the first attempt on the part of the bank to make a broker liable on the ground of breach of warranty of his authority to act under a power of attorney to transfer stock. The bank made the inquiries which they usually make in such a case. They had the signature of each of the stockholders in the books, and had the opportunity of comparing them with the signatures to the power of attorney. Starkey was acquainted only with the signature of F. W. Oliver, and acted quite innocently in the belief that both signatures were genuine, and there was no reason to suppose that the execution had not been duly attested. We contend that an action for breach of warranty cannot be maintained in the circumstances of the present case. The general rule of law is that a man is not liable for an innocent misstatement of fact in reliance upon which another acts: *Derry* v. *Peek*. (1) An exception from this general rule was, no doubt, established by *Collen* v. *Wright* (2), in which the Exchequer Chamber held (Cockburn C.J. dissenting) that a person who entered into a contract professing to act as agent for another, from whom in fact he had no authority, was personally liable to the other party to the contract. The Court held that there was an implied warranty of the authority to contract. But that case applies only to a representation of authority to contract, and no other case has gone beyond that. See also note (*g*) (3) and per Wightman J. (4) In the present case Starkey did not invite or induce the bank to enter into any contract by means of his representation that he had authority as attorney to make the transfer. The only contract existing was with the transferee of the stock. In *Polhill* v. *Walter* (5) Lord Tenterden C.J. in his judgment (6) put the very case which has arisen here, and said that the person who made the representation would not be liable. The learned judge said: "if he had acted upon a power of attorney which he supposed to be genuine, but which

(1) 14 App. Cas. 337.
(2) 8 E. & B. 647.
(3) Ibid. 654.
(4) S.C. 7 E. & B. 301, 313.
(5) (1832) 3 B. & Ad. 114; 37 R. R. 344.
(6) 3 B. & Ad. 124.

C. A. 1902 OLIVER v. BANK OF ENGLAND.

was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false." In *Weeks* v. *Propert* (1) the representation was made for the purpose of bringing about a contract. In *Dickson* v. *Reuter's Telegram Co.* (2) it was held that the defendants were not liable for an innocent misrepresentation, it not having been made for the purpose of inducing a contract, and the Court distinguished the case from *Collen* v. *Wright.* (3) Brett L.J. said, in *Dickson's Case* (4), that the general rule is that "no erroneous statement is actionable unless it be intentionally false," and he added (5) that the liability in such a case as *Collen* v. *Wright* (3) "arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation." *Firbank's Executors* v. *Humphreys* (6) did not carry the exception any further. There also the representation was made with a view to a contract. The judgment of Lindley L.J. in that case was expressly founded upon *Collen* v. *Wright* (3), and the learned judge said (7) that there was one well-established exception to the general rule, namely, "where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." "Deal with him" must mean "enter into a contract with him." In the same case Lord Esher M.R. said (8): "The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." But that is a mere dictum, and it is submitted that by the word "transaction" the learned judge meant a contract. And indeed the word "transaction" implies that something passes from the

(1) (1873) L. R. 8 C. P. 427.
(2) (1877) 3 C. P. D. 1.
(3) 8 E. & B. 647.
(4) 3 C. P. D. 7.
(5) 3 C. P. D. 8.
(6) 18 Q. B. D. 54.
(7) Ibid. 62.
(8) Ibid. 60.

one party to the other. In that case there was an attempt to make a contract for the issue of debenture stock, and it failed because the company had no power to issue any more of that stock.

[COZENS-HARDY L.J. Here the bank have a statutory duty to perform. Mr. Starkey comes to them and says, "I demand that you will exercise your statutory duty to my principal," and thereupon the bank perform their statutory duty. Is not that a "transaction"?]

A "transaction" is an operation producing results intended to alter the legal position of the parties to it. That was not the case here. The object here was merely to enable a legal transaction, that is, a transfer, to be carried out: there was no intention as between the two parties, Starkey and the bank, to involve the bank in any liability.

[VAUGHAN WILLIAMS L.J. referred to *Merry* v. *Nickalls*. (1)]

In that case, which was that of a jobber, not a broker, there was a contractual relation between the seller of shares on the Stock Exchange and the jobber. The jobber contracts to take the shares himself, or to find some other person who is able and willing to take them. If he fails to do the latter, he is liable himself to complete the contract. That case was within *Collen* v. *Wright* (2), and is distinguishable from the present case. *Bloomenthal* v. *Ford* (3) is also distinguishable. In that case estoppel, which is a rule of evidence, assisted the plaintiff. The defendant was defeated because he was not permitted to tell the truth. In *Low* v. *Bouverie* (4) Bowen L.J. said: "Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said."

[VAUGHAN WILLIAMS L.J. Suppose a passenger who has taken a ticket for Brighton is told by a railway porter that a particular train is the train for Brighton, and it turns out not

(1) (1872) L. R. 7 Ch. 733; (1875) L. R. 7 H. L. 530.
(2) 8 E. & B. 647.
(3) [1897] A. C. 156.
(4) [1891] 3 Ch. 82, 105.

C. A. 1902 OLIVER v. BANK OF ENGLAND.

to be the Brighton train, so that the passenger is taken to a wrong place, would he not have a right of action against the porter ?]

In that case two representations would be made by the porter—(*a*) that the train was the Brighton train ; (*b*) that he had a duty to the passenger to tell him the truth. If there were such a duty, it would arise out of the contract constituted by the ticket. There might be an estoppel if the porter had no authority to make the representation.

But there was no such duty here on the part of the broker to the bank. The bank made their own inquiries, and acted upon the result of those inquiries. The broker kept back nothing from the bank, and he had no means of discovering the fraud. When two persons are equally deceived there is no ground for making one of them liable to the other for the loss occasioned to him by the frauds.

[COZENS-HARDY L.J. Were not the brokers wrong in making the cheque for the proceeds of the sale of the stock payable to the order of F. W. Oliver alone ?

VAUGHAN WILLIAMS L.J. Could not the stockholder have sued the brokers for the proceeds of sale as money received by them to his use ?—*Marsh* v. *Keating*. (1)]

That is not the present case. The broker is defending himself against the bank's claim, and on the alleged breach of warranty of authority.

[COZENS-HARDY L.J. Would the brokers have any answer to an action by the plaintiff to recover the purchase-money of the stock ? And, if so, ought not the bank, who have paid the plaintiff, to be subrogated to his right against the brokers ?]

The two liabilities are distinct, though they arise out of the same transaction. There might be an answer to an action by the plaintiff against the brokers, e.g., carelessness on his part.

[VAUGHAN WILLIAMS L.J. If an action for breach of warranty will lie in any case, why should it be limited to breach of warranty of authority to enter into a contract ?]

It must be admitted that there is no logical reason for the

(1) (1834) 2 Cl. & F. 250 ; 37 R. R. 75.

limitation. But as yet an exception from the general rule, that a man is not liable for an innocent misrepresention, has been established in the one case of an untrue representation of authority to make a contract, and it is contended that the exception ought not to be extended. The question is whether this case is governed by *Derry* v. *Peek* (1) or by *Collen* v. *Wright*. (2)

[VAUGHAN WILLIAMS L.J. referred to *Barton* v. *North Staffordshire Ry. Co.* (3)]

In *Smout* v. *Ilbery* (4) Alderson B., in delivering the judgment of the Court of Exchequer, said (5): "On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act." Under none of these three classes does the present case fall: see also *Randell* v. *Trimen*. (6) In *Jenkins* v. *Hutchinson* (7) it was held that an agent who, professing to act for a principal, but having in fact no authority to do so, had entered into a charter-party in the name of the principal, was not liable himself on the charterparty. In the course of the argument in that case Erle J. said (8): "Is there any instance except the present, if it be one, in which the law makes a contract for a man which neither he nor the other party intended to make?"

[VAUGHAN WILLIAMS L.J. The Court appear to have treated the question as being, what was the proper form of action.]

The remedy against the person who professes to make a contract as agent, but has no authority, is either by an action for deceit or on an implied contract that he had authority, but

(1) 14 App. Cas. 337.
(2) 8 E. & B. 647.
(3) (1888) 38 Ch. D. 458.
(4) (1842) 10 M. & W. 1.
(5) 10 M. & W. 10.
(6) (1856) 18 C. B. 786, 793–4.
(7) (1849) 13 Q. B. 744.
(8) Ibid. 748.

C. A. 1902 OLIVER v. BANK OF ENGLAND.

not by treating him as principal: *Lewis* v. *Nicholson*. (1) Where it appears that a man did not intend to bind himself, but only to make a contract for a principal, he cannot be sued as principal merely because he acted without authority. (2) There is a broad distinction between a representation and a warranty—a distinction as old as *Chandelor* v. *Lopus* (3), where it was held that a representation is only a warranty where so intended. If a warranty is to be implied from a representation, then a warranty must be implied in *Derry* v. *Peek* (4), which was a case of representation. If it is the law that every representation which causes a change of position must be treated as an implied warranty, then the remedy would no longer be by an action for deceit, but by an action on implied warranty; in which case *Derry* v. *Peek* (4) would no longer be the law of the land. No liability arises on a bare misrepresentation, but only when it is acted upon to the prejudice of the representee. It is impossible to say, consistently with *Derry* v. *Peek* (4), that, where there is an innocent misrepresentation by A. to B., and B. then acts upon it, A. is liable for that innocent misrepresentation. *Slim* v. *Croucher* (5) is not an authority standing in our way, for it has been overruled by *Derry* v. *Peek* (4) as pointed out in *Low* v. *Bouverie*. (6)

[COZENS-HARDY L.J. *Low* v. *Bouverie* (6) went on the ground that a trustee was under no legal obligation to make inquiries himself with a view to giving information to an intending incumbrancer about to deal with the cestui que trust; and that all he is bound to do is to answer honestly any questions put to him.]

So here there was no legal obligation on Starkey to do more than answer honestly any questions put to him by the bank.

In considering whether *Collen* v. *Wright* (7) applies to such a case as the present, we submit that, upon the facts here, the doctrine of that case ought not to be applied when we find that the bank did not really rely upon any representation made to

(1) (1852) 18 Q. B. 503, 515.
(2) Ibid. 511.
(3) (1604) Cro. Jac. 4; 2 Sm. L. C. 10th ed. p. 52.
(4) 14 App. Cas. 337.
(5) (1860) 1 D. F. & J. 518.
(6) [1891] 3 Ch. 82.
(7) 8 E. & B. 647.

them by Starkey when he came to sign the transfer book, but, before he came, took steps to verify the signatures to the power. *Lilly, Wilson & Co.* v. *Smales, Eeles & Co.* (1) shews that the doctrine of *Collen* v. *Wright* (2) may give way to circumstances.

H. D. Greene, K.C., Latham, K.C., and *Howard Wright*, for the bank, were not called upon.

VAUGHAN WILLIAMS L.J. We need not trouble you, Mr. Greene. In this case the facts may be very simply stated. There was produced before the officials of the Bank of England by the appellant, a stockbroker, a power of attorney which purported to have been executed by two persons, Frederick William Oliver and Edgar Oliver. A sum of Consols was standing in the names of those two, and the broker had been instructed by Frederick William Oliver, on behalf of himself and Edgar Oliver, to sell those Consols. Following the ordinary course the broker had to apply for a proper form of power of attorney, and having applied for and obtained the form, the authority was then apparently executed by the two persons in whose names the Consols were standing, and the broker in due course produced at the Bank of England this authority. Sad to say, the name of Edgar Oliver was forged by his brother, Frederick William Oliver. The broker, as I have said, produced this authority, and upon the production of it he demanded that the bank should perform their statutory duty. I say "demanded," because that is the actual word used in his formal application. The Bank of England, acting on that demand, did, in pursuance of this power of attorney, perform their statutory duty by allowing the transfer of the stock. The whole question we have to decide is, whether or no, as the law stands at the present moment, there is raised, by implication of law, a warranty by the broker of the authority on which he demanded that the bank should act. He purported to act as the agent of the two Olivers, but, by reason of this forgery, he had not their authority so to act. The consequence is that this question now arises, Aye or no, does the law raise an implied warranty as against the broker? In my judgment it

(1) [1892] 1 Q. B. 456. (2) 8 E. & B. 647.

C. A. 1902 OLIVER v. BANK OF ENGLAND. Vaughan Williams L.J.

does. We have heard a very interesting argument from Sir Robert Reid and Mr. Upjohn; but in my judgment that argument invited the Court to deal with questions which are not raised in this case for our decision. We have simply to decide, first, whether the present case comes within the decision of *Collen* v. *Wright* (1); and in the second place, assuming that it does, whether there has been any decision which has made *Collen* v. *Wright* (1) cease to be good law; and perhaps, thirdly, whether any of the decisions since *Collen* v. *Wright* (1) have so narrowed that decision as to prevent it applying in the present case. Now, in my judgment, none of those later decisions have had that effect. On the contrary, they have had just the opposite effect; for they seem to me to shew, and to shew to demonstration, that the present case is governed by that decision.

I will first deal with the decision in *Collen* v. *Wright* (1) itself. Before considering the actual judgments, I wish to point out that this is a decision the weight of which is very much enhanced by the fact that in the Exchequer Chamber Cockburn C.J. was a dissentient judge; and in the reasons given for his judgment he put forward a great many of those considerations which have been urged upon us by Sir Robert Reid and Mr. Upjohn. Now, the judgment in *Collen* v. *Wright* (1) was delivered by Willes J., and the judges who concurred with that judgment were Pollock C.B., Vaughan Williams J., Bramwell B., Watson B., and Channell B. The judgment of Willes J. is very short, and the material statements in it, to my mind, are these: after stating the case of an agent professing to act for a third party, by whom he has not been authorized, but who, so professing, honestly induces somebody else to contract with him as the agent that he professes to be, Willes J. says this (2): "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have

(1) 8 E. & B. 647. (2) 8 E. & B. 657.

does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise." Such is the statement of Willes J. of the proposition. Cockburn C.J. did not agree with it. He thought that no such implied contract ought to be raised. He pointed out that, as a matter of history, it could not be raised, because for a long time it had been supposed, first, that a person who honestly made a statement might have an action brought against him upon the ground that, although he had made the statement honestly, yet it was a statement of a fact as to which he had a duty to inform himself; and under such circumstances an action would lie against him in the nature of an action for deceit. That had ceased to be the law. Secondly, for a long time it was supposed, if a man professed to act as an agent for another to make a contract, that in the event of his turning out not to be an agent, although he honestly supposed he was, of that person, he could be made liable as principal on that contract. That again had ceased to be the law. Cockburn C.J. thought that the fact that the previous decisions had left the person who acted upon the honest misrepresentation without a remedy was no ground for inventing a new fiction of law in order to give him a right. But, notwithstanding that, Willes J. and his brethren had no doubt that an implied warranty was raised in such a case.

Now, I agree that, so far as the actual decision in *Collen* v. *Wright* (1) is concerned, it is really only a decision in a case in which some one is professing to be contracting as the agent of another. Cases were put in argument in which the representation was not of agency but of something else: as, for instance, *Derry* v. *Peek* (2), where the representation was that the company there mentioned were entitled to use steam machinery. All I can say is that, for the purposes of my judgment, I broadly assume that the decision in *Collen* v. *Wright* (1) is a decision which is applicable to the case of a person who is professing to act as agent of another, and so makes a representation for the purpose of inducing a third person to act, as a matter of business, upon the faith of that

(1) 8 E. & B. 647. (2) 14 App. Cas. 337.

C. A. 1902 OLIVER v. BANK OF ENGLAND. Vaughan Williams L.J.

representation. But the learned counsel for the appellant argued that the Court should not extend that decision to all cases in which there is a professing to act as agent for another, but that the case only applies where the professing agent proposes to make a contract on behalf of his alleged principal. Upon the actual facts of *Collen* v. *Wright* (1) that is true; but I see nothing in the judgment of Willes J. which in the slightest degree leads one to suppose that he intended thus to limit the operation of his judgment; on the contrary, his observation upon the subject of the consideration given to the professed agent for the promise leads rather to a contrary conclusion.

Then one has to look at the later cases to see whether there is anything to justify such a limitation. The first of the later cases in point of date is *Dickson* v. *Reuter's Telegram Co.* (2) The second is *Firbank's Executors* v. *Humphreys.* (3) As *Firbank's Case* (3) is nearer to the question of the existence of the limitation suggested by Mr. Upjohn, I will deal with that case first. Now, that was a case in which the original plaintiff, Mr. Firbank, a railway contractor, was entitled to be paid by the railway company in cash; but, the company not being in a position to pay cash, an agreement was entered into during the progress of the works by which the plaintiff agreed to accept debenture stock in lieu of cash. Under those circumstances the defendants, who were directors of the company, issued to the plaintiff certificates for the debenture stock which the plaintiff had already agreed by a binding agreement with the company that he would take in lieu of cash. Unfortunately, it turned out that when that agreement was made and the certificates for debenture stock were issued the power of the company to issue debenture stock had already been exhausted, and that therefore the directors who purported to issue the certificates had no authority so to do. Thereupon Mr. Firbank proceeded to sue the directors who issued this stock, his ground of action being based upon the warranty of authority which must be implied from their acts. When the case came on to

(1) 8 E. & B. 647. (2) 3 C. P. D. 1.
(3) 18 Q. B. D. 54.

be argued the then directors were variously represented by a very distinguished array of counsel, which included Mr. Rigby, Sir Horace Davey, Mr. H. D. Greene, and Mr. R. S. Wright. In the argument which is attributed here to Mr. Rigby, he having pointed out that there was a contract binding the company in existence, and that all the directors had done was to issue the debentures after that binding contract had been made, says: "To make the defendants liable under these circumstances would be to extend the principle of *Collen* v. *Wright* (1) far beyond any of the recorded cases." Then he points out that in a number of other cases similar to *Collen* v. *Wright* (1) no contract existed, as in this case (*Firbank's Case* (2)), binding on the principal. In delivering judgment Lord Esher M.R. states the argument upon either side. He says (3): "On the one side, it is said that according to the rule in *Collen* v. *Wright* (1) Firbank had a right to sue the directors. The way in which it is put is, that the directors were agents of the company and had authority to issue debenture stock binding on the company, provided the powers of issuing such stock had not been exhausted; but they had no authority to make any over issue so as to bind the company. By issuing these certificates it is said that it must be implied that they had affirmed that they had authority to issue them, and that Firbank accepted them, relying on that affirmation of authority, and as by reason of want of authority he has been damaged, the defendants have made themselves personally liable within the rule laid down in *Collen* v. *Wright*. (1) On the other hand, it is said that cannot be so, because this debenture stock was issued in fulfilment of a contract which was binding on the company, whereas in that case the contract which the agent professed to enter into on behalf of his principal was invalid as against the principal. I think the language used in *Weeks* v. *Propert* (4) and *Dickson* v. *Reuter's Telegram Co.* (5) shews that the principle of *Collen* v. *Wright* (1) extends further than the case of one person inducing another to enter into a

(1) 7 E. & B. 301; 8 E. & B. 647.
(2) 18 Q. B. D. 54.
(3) 18 Q. B. D. 59.
(4) L. R. 8 C. P. 427.
(5) 3 C. P. D. 1.

C. A. 1902 OLIVER v. BANK OF ENGLAND. Vaughan Williams L.J.

contract." Now the whole basis of the argument of Sir Robert Reid and Mr. Upjohn has been that the decision in *Collen* v. *Wright* (1) does not extend further than the case of one person inducing another to enter into a contract. Then Lord Esher goes on to state the effect of the decision in *Collen* v. *Wright*. (1) He says (2): "The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

It seems to me that those words cover, and of necessity cover, the present case. The only way in which it is contended that those words do not cover the present case is by suggesting that the words "to enter into any transaction" should be limited to a case where the person with whom the alleged agent is purporting to act is induced to enter into a contract: but I cannot conceive any meaning being given to the word "transaction" which would exclude the present case. Here, as I have said, is a case in which the broker comes to the bank alleging that he has authority, and demands that the bank shall perform its statutory duty. I fail to see how any meaning can be given to the word "transaction" so as to prevent that being a transaction entered into between the bank and the broker.

Then it is suggested that something is to be found in Lindley L.J.'s judgment in *Firbank's Case* (3) which puts the decision upon a different basis. I do not think so. On the contrary, I think that, when the appellant's counsel spoke of that part of Lord Esher's judgment which I have just read as being a mere dictum, they were not giving sufficient importance to the passage. It seems to me that the whole passage is not a mere dictum, but the reasoning upon which Lord Esher based his decision. I know it is often said that

(1) 8 E. & B. 647. (2) 18 Q. B. D. 60.
(3) 18 Q. B. D. 54, 62.

Lindley L.J. in his judgment puts the case upon another ground. I cannot agree. I quite agree that Lindley L.J. does point out that in his opinion, even placing the strictest interpretation upon *Collen* v. *Wright* (1), it might be that *Firbank's Case* (2) came within that decision; for he says: "Moreover, they" (the directors) "in effect requested him" (Firbank) "not to insist on payment of cash, and to go on with the works in consideration of receiving debenture stock." That is to say, he takes a view of the case which imports a new agreement as between the company, the alleged principals of the directors, and the plaintiff. But observe how the Lord Justice proceeds: "There is the representation by the directors to the contractor and consideration given by him in the shape of action by him on the faith of such representation. Nothing more is necessary to make the principle laid down in *Collen* v. *Wright* (1) applicable to the case." Then, a little lower down, he says: "Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well-established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." Again it seems to me that the present case clearly falls within the very words of that judgment. In my judgment, just as it is impossible to give any definition of the word "transaction" used by Lord Esher which would exclude that which was done as between the bank and the broker, so this which was done between the bank and the broker comes within the very words of Lindley L.J.'s judgment.

I will now very shortly call attention to the judgment in *Dickson* v. *Reuter's Telegram Co.* (3) In that case, what happened was that the defendants, the telegram company, had delivered to the plaintiffs a message which was not intended for them. The plaintiffs, then, reasonably supposing that the message came from their agents and was intended for them, acted upon it and incurred loss. It was held by the Court of Appeal,

(1) 8 E. & B. 647. (2) 18 Q. B. D. 54, 62.
(3) 3 C. P. D. 1.

C. A. 1902 OLIVER v. BANK OF ENGLAND. Vaughan Williams L.J.

affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of any implied representation by them that the message was sent by the plaintiffs' agents. Bramwell L.J., in delivering his judgment, first says he does not think that *Collen* v. *Wright* (1) is really an exception to the rule that an action will not lie for an innocent misstatement. As to that, I do not feel bound to say anything by way of criticism at all, since it is not necessary to do so in this case. Then he goes on to say (2): "*Collen* v. *Wright* (1) establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen* v. *Wright*." (1) Then Brett L.J. makes a statement which is really to the same effect. He says (3): "I have come to the conclusion that the decision in that case" (*Collen* v. *Wright* (1) "was founded upon a different and independent rule, which may be stated to be, that where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation." It does not seem to me that there is anything in those judgments to support the limitation which the appellant's counsel seek to put upon the rule laid down in *Collen* v. *Wright* (1), and we shall accept to-day the interpretation of that rule which was laid down by Lord Esher in the way I have mentioned in *Firbank's Case*. (4)

(1) 8 E. & B. 647.
(2) 3 C. P. D. 5.
(3) 3 C. P. D. 7.
(4) 18 Q. B. D. 54.

Then it is suggested, first, that *Derry* v. *Peek* (1) has in some way or other overruled the decision in *Collen* v. *Wright* (2); and, secondly, that *Low* v. *Bouverie* (3) shews that in the Chancery Division cases analogous to that of *Collen* v. *Wright* (2) have been treated as overruled. It is not suggested that *Derry* v. *Peek* (1) in terms overrules *Collen* v. *Wright* (2): in fact, that case is not mentioned at all in *Derry* v. *Peek* (1); but it is said that because it has now been finally decided in the House of Lords that no action will lie for a misrepresentation which is not consciously made, therefore it follows that there can be no state of circumstances based upon a representation which can raise an implied warranty such as is contended for here. The rule, as I have stated, in *Collen* v. *Wright* (2) is merely that, if a man professes to be an agent and gets another to act in matters of business upon that profession, and that acting is to the detriment of the person who is so induced to act, the law raises an implied warranty of the averred authority of the agent. I confess I do not see myself that *Derry* v. *Peek* (1) in any way renders it impossible to continue to affirm that *Collen* v. *Wright* (2) is good law.

Then, with regard to *Low* v. *Bouverie* (3), there are two observations to be made. In the first place, as regards the judgments of two of the members of the Court, Lindley and Bowen L.JJ., both those learned Lords Justices use expressions respecting actions based upon warranties which clearly shew that they considered *Derry* v. *Peek* (1) left *Collen* v. *Wright* (2) untouched. Then coming to the judgment of Kay L.J., although it is true that the Lord Justice does not actually say anything leading one to suppose that he had in his mind, as an exception from the *Derry* v. *Peek* (1) rule, the rule in *Collen* v. *Wright* (2), yet it is perfectly plain that he thought there were certain cases in which the Court of Chancery had, in days before *Derry* v. *Peek* (1), held that, where there had been an innocent misrepresentation, the person who had made it was liable to make good his words. The learned Lord Justice thought those cases still continued to be in force

(1) 14 App. Cas. 337. (2) 8 E. & B. 647. (3) [1891] 3 Ch. 82.

C. A. 1902 OLIVER v. BANK OF ENGLAND. Vaughan Williams L.J.

notwithstanding the decision in *Derry* v. *Peek* (1); and he mentioned one instance of that, the case of estoppel. Of course, he goes on to point out, and with perfect accuracy, that estoppel does not touch a case like that before him—that estoppel, being really a rule of evidence only, can only apply in a case where it is sought to make a man liable by precluding him proving the true facts, through his conduct having been inconsistent with those true facts, and such as to induce other people to alter their position. But it is obvious, to my mind, that Kay L.J. thought there might be cases in which a man could be fixed with a liability in respect of an innocent misrepresentation notwithstanding the decision of the House of Lords in *Derry* v. *Peek*. (1)

For these reasons I think that the judgment of Kekewich J. is right, and should be affirmed.

STIRLING L.J. I also think that the decision of Kekewich J. ought to be affirmed.

The question is whether the principle which was established in the case, which has been so much discussed, of *Collen* v. *Wright* (2), should be applied to the present case or not. The main argument which has been addressed to us on behalf of the appellant in this case is, in substance, this—that *Collen* v. *Wright* (2) is a case of extremely limited application, and is only to be followed in a similar class of cases—that is to say, where a person representing himself to be an agent for another, and to have authority for entering into a contract on his behalf, induces a third person to enter into such a contract on the faith of that representation. It seems to me that in this Court that argument cannot prevail. That argument was urged in this Court by very eminent counsel in the case of *Firbank's Executors* v. *Humphreys* (3), and, as I read the judgments of Lord Esher M.R. and Lindley L.J., they both distinctly negatived that contention, and with them Lopes L.J. agreed. I take the rule applicable in this Court to cases of this description to be as it is stated by Lord Esher in that case (4):

(1) 14 App. Cas. 337.
(2) 8 E. & B. 647.
(3) 18 Q. B. D. 54.
(4) Ibid. 60.

"The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

That being so, it seems to me the only question to be considered is whether the rule is applicable in the present case. It is said that there was no "transaction" within the meaning of the rule so laid down by Lord Esher. Now, what took place? The defendants, the Bank of England, are by law entrusted with certain duties with reference to stock of the description in question. The stock is transferable only in the books of the bank, and if the bank refuse or neglect to perform their duties they are liable to an action at the instance of the stockholder. Mr. Starkey, who is a broker, came to the bank with a document purporting to be signed by two stockholders whose names were registered in the books, and formally made a demand to be allowed to exercise the powers which purport to have been conferred on him by that document, and to be allowed to make an entry in the book which has the effect of transferring the stock from the persons in whose names it is standing to another person. To that the bank accede: the entry is made, and the transfer effected. It turns out, unfortunately, that in the document the name of one of the stockholders was forged, and he has brought an action against the bank and obtained judgment, compelling them to restore him to his former position.

Now, did not what took place between Mr. Starkey (professing to act on behalf of his principals) and the bank amount to a "transaction"? It seems to me that it would be a very narrow reading of the word to hold that this was not a "transaction"; because, if the asserted power had been really valid, the result would have been to bring about a change in the legal position of the then registered holders of the stock, so that the new transferee would have become the legal owner of

C. A. 1902 OLIVER v. BANK OF ENGLAND. Stirling L.J.

the stock, and to the new transferee the bank would henceforth have been under the obligation to pay the dividends. It unfortunately turned out that the power was invalid, and the result to the bank I have already stated. The consequence, therefore, of what took place was that the bank changed its legal position with reference to this stock, and very much to their injury, because judgment has been obtained against them. I cannot think this is not a case falling within the rule.

Then the only other point I think I need refer to is this. It was urged that, regard being had to the precautions which the Bank of England take in comparing the signatures to powers of attorney, and to other precautions they take for the purpose of ascertaining whether the powers which are presented to them really emanate from the principals to whom the stock belongs, a warranty ought not in this case to be implied. In my opinion, that contention is not well founded. It is not sufficient to shew that the bank took precautions unless it is also shewn that they relied on those precautions alone. It has often been held in actions for misrepresentation that where a misrepresentation is proved and is shewn to have been relied upon, that is enough, although the person who enters into the transaction on the faith of the misrepresentation may have also had other inducements to enter into the transaction. There is an instance of that in the case of *Edgington* v. *Fitzmaurice*. (1)

It seems to me that enough has not been shewn to enable Mr. Starkey to say that the bank did not act on the faith of his assertion of authority, and I think the conclusion which was come to by Kekewich J. was right.

COZENS-HARDY L.J. I so entirely agree with what has fallen from my learned brethren, that I think it would only be wasting time if I were to add anything.

Solicitors: *Morley, Shirreff & Co.; Freshfields.*

(1) (1885) 29 Ch. D. 459.

G. I. F. C.

KELLY'S DIRECTORIES, LIMITED *v.* GAVIN AND LLOYDS.

C. A. 1902 Feb. 22.

[1900 K. 502.]

Copyright—Infringement—"Print or cause to be printed"—Agent—Estoppel—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 15.

The defendant Gavin published a book which contained passages copied from a book of the plaintiffs, and thus infringed their copyright. A contract had been entered into between Gavin and the defendants Lloyds that they should print his book, receiving payment from him for so doing. After they had printed some of the sheets (including the title-page) they found that they could not complete the printing of the remaining sheets by the date fixed for the publication of the book, and at Gavin's request they relinquished their contract, so that he might have the remaining sheets printed elsewhere. He accordingly contracted with other printers to print the remaining sheets. When the book was published it bore on the title-page the statement "Printed at Lloyds." The piracy occurred in those sheets which were not printed by Lloyds, and they were ignorant of the piracy until they were informed of it after the publication. The Court were satisfied by the evidence that Gavin and Lloyds were not partners or co-adventurers in the publication of the book, and that the printers who printed the pirated matter were agents of Gavin and not of Lloyds:—

Held, that Lloyds had not printed the pirated matter, and that they had not "caused" it to be printed within the meaning of s. 15 of the Copyright Act, 1842, and that consequently they were not liable under that section.

Decision of Byrne J., [1901] 1 Ch. 374, affirmed.

APPEAL against the decision of Byrne J. (1)

The facts are fully stated in the former report, and, having regard to the judgments of the Court of Appeal, the following short summary will be sufficient for the present purpose.

The action was brought to restrain the defendants from printing, publishing, &c., any copy or copies of a book called "Lloyds' Diary for Merchants, Shippers, and Foreign Buyers for 1900," or causing or permitting any such copy or copies to be so printed, published, &c., or from copying or pirating from any edition of the plaintiffs' directory called "Kelly's Directory

(1) [1901] 1 Ch. 374.

C. A. 1902

KELLY'S DIRECTORIES, LIMITED v. GAVIN AND LLOYDS.

of Merchants, Manufacturers, and Shippers of the United Kingdom," and from otherwise infringing the plaintiffs' copyright in their directory.

The book called "Lloyds' Diary, &c.," had been recently published by the defendant Gavin, under the supervision and in conjunction with the defendant corporation Lloyds, who allowed Gavin to make use of their name in the title of the book. By an arrangement between them and Gavin the corporation were to receive from him for the use of their name 100*l.* a year, and 5 per cent. upon the receipts from advertisements appearing in the diary and upon the proceeds of its sale.

The diary as published bore on its title the statement, "Printed at Lloyds, Royal Exchange, London." It was proved at the trial that some portions of the book had been copied from the plaintiffs' directory, but it was also proved that those portions had not in fact been printed by Lloyds. An arrangement had been made between Gavin and Lloyds that the whole of the diary should be printed by Lloyds, they receiving a payment from him for the printing. They accordingly printed the earlier sheets of the diary, but, after they had done this, they found that it would be impossible for them to complete the printing of the remaining sheets in time for publication at the beginning of the year 1900. It was then arranged at Gavin's request that he should be at liberty to have the remaining sheets of the book printed by some other printer. He accordingly instructed Messrs. Straker to print the remaining sheets; and when they had done this those sheets were bound together with the earlier sheets which had been printed by Lloyds, and the whole book was then published by Gavin, with the above-mentioned statement on the title-page that it had been printed at Lloyds. The pirated matter was contained in the sheets which had been printed by Messrs. Straker. Lloyds were ignorant of the piracy until after the publication.

At the trial of the action Gavin did not appear, and an injunction was granted against him, with costs.

It was contended on behalf of the plaintiffs that Lloyds also were liable, on the ground that they had, within the

meaning of s. 15 of the Copyright Act, 1842, "caused" the pirated portion of the book to be printed.

Byrne J. held that Lloyds had not "caused" that portion of the book to be printed, and he gave judgment for them, but without costs, on the ground that they had allowed their name to appear on the title-page as the printers.

The plaintiffs appealed.

Levett, *K.C.*, and *Edward Ford*, for the plaintiffs. It is submitted that Lloyds "caused" the pirated matter to be printed. The printer of a book is bound by statute to place his name upon it as printer, and Lloyds, by allowing their name to appear on the title-page, have adopted the printing of the whole book. They may not, strictly speaking, be estopped from shewing that they did not print the whole; but the statement on the title-page is evidence to shew that they "caused" to be printed that part which they did not actually print. Moreover, Lloyds derived profit from the sale of the book, and by relinquishing their right to print the whole book they "caused" Messrs. Straker to print the latter part of it, though Messrs. Straker were not their agents. *Rex* v. *Gutch* (1) and *Watts* v. *Fraser* (2), cases which related to the publication of a libel, are in favour of the liability of Lloyds. In the former case Lord Tenterden C.J. said (3): "A person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot shew that he was individually concerned in the particular publication." It was through Lloyds that Gavin acquired the information which enabled him to compile his book. In the Court below reliance was placed on two cases: *Russell* v. *Briant* (4) and *Lyon* v. *Knowles* (5); but those cases are distinguishable from the present case. They related to dramatic copyright, and arose under a different

(1) (1829) Moo. & M. 433; 31 R. R. 744.
(2) (1835) 7 C. & P. 369.
(3) Moo. & M. 437.
(4) (1849) 8 C. B. 836.
(5) (1863) 3 B. & S. 556.

C. A. 1902 KELLY'S DIRECTORIES, LIMITED v. GAVIN AND LLOYDS.

statute, the words of which differ from those of the Copyright Act of 1842, which governs the present case. Lloyds and Gavin acted jointly in the matter from beginning to end. There being a binding agreement between Lloyds and Gavin that Lloyds should print the book, it could not without their consent have been printed elsewhere. By giving their consent Lloyds in effect "caused" the book to be printed by Strakers.

Scrutton, K.C., and *F. D. MacKinnon*, for the defendants Lloyds, were not called upon.

VAUGHAN WILLIAMS L.J. The question is whether Byrne J. was right in coming to the conclusion that Lloyds neither printed the pirated portion of the diary nor "caused" it to be printed. In my opinion, the learned judge was perfectly right. It has scarcely been contended that Messrs. Straker, who actually printed the pirated portion, could be properly described as agents of Lloyds: Lloyds could only have "printed" that part of the book if Strakers were their agents. It is admitted that the order to print was given by Gavin to Messrs. Straker, and it was on his credit that they did it. They would have had to sue Gavin for payment for their work. If it could be shewn that Lloyds were partners or co-adventurers with Gavin in the publication of the book, the fact that Strakers were the agents of Gavin would render them also the agents of Lloyds. But on the evidence it is plain that Strakers were agents of Gavin only. No such connection between Lloyds and Gavin has been proved as would make them either partners or joint adventurers. It is impossible, therefore, to say that Lloyds printed the pirated part of the book. The plaintiffs' counsel had, therefore, to fall back upon the words "cause to be printed" in s. 15 of the Copyright Act. But when asked in what sense did Lloyds "cause" this part of the book to be printed, they said that Lloyds had contracted with Gavin to print the whole book, and they were to receive from him a specified payment for so doing. By a lucky accident they found, after they had printed some of the sheets, that they were so busy with other work that they would not be able to complete the printing of the remaining sheets

(which contained the pirated matter) in time for publication, and they were willing to forego their right under their contract. Gavin was also willing that they should do this, probably because he thought that he could get the printing done more cheaply elsewhere. Accordingly Lloyds relinquished their contract, and Gavin employed Messrs. Straker to do the printing. Under these circumstances it is said that Lloyds "caused" the pirated matter to be printed. In my judgment it comes at the outside only to this, that Lloyds permitted the printing to be done by the other printers. If a man who has a right to print a book stands back and allows some one else to do the printing, I do not think it can be said that he "causes" the book to be printed. In my opinion, upon the evidence, it cannot be truly said that Lloyds either printed the pirated portions of the book or "caused" them to be printed. The appeal should be dismissed with costs.

STIRLING L.J. I agree.

COZENS-HARDY L.J. I also agree. The plaintiffs' counsel rested their case partly upon the statement on the title-page of the book, "Printed at Lloyds." If that were put as an estoppel against Lloyds, I could have understood the argument. But that would have been a hopeless contention; the statement was true as regarded the title-page. That being so, I cannot see how the argument is relevant. In my opinion, the judgment of Byrne J. was quite right and ought to be affirmed.

Solicitors: *Scott, Spalding & Bell; Waltons, Johnson & Co.*

W. L. C.

C. A.
1901
FARWELL J.
March 28, 29.
C. A.
1902
Feb. 22, 24.

OWEN *v.* GIBBONS.

[1900 O. 1091.]

Inheritance—Root of Descent—"Purchaser"—Devise to Testator's "Right Heirs"—Co-heiresses—Joint Tenancy or Co-parcenary—Inheritance Act, 1833 (3 & 4 *Will.* 4, *c.* 106), *s.* 3.

Under a devise to or in trust for a testator's "right heirs," the person who at the time of the testator's death is his heir-at-law takes now, by virtue of s. 3 of the Inheritance Act, 1833, as devisee, and not by descent as before the Act.

The word "heir" in that section includes "heirs."

And s. 3 operates also to alter the quality of the estate taken by the heir; so that, if a testator leaves co-heiresses, they, under such a devise, take as joint tenants, not as co-parceners.

Decision of Farwell J. affirmed.

Re Baker, (1898) 79 L. T. 343, approved.

John Gibbons by his will, dated September 6, 1845, devised real estate to trustees in fee upon the trusts therein mentioned, and, on failure of those trusts, in trust for "my own right heirs for ever."

The testator died on December 12, 1847, and at this time his two daughters, Mary Parry and Ann Gibbons, were his co-heiresses. Both the daughters married. Mary Parry died on April 26, 1867, and Ann Gibbons died in October, 1882. The plaintiff was the heir-at-law of Ann Gibbons. All the trusts of the will prior to the trust for the testator's right heirs had failed or determined.

The plaintiff contended that under the will the testator's two daughters became on his death entitled to the property in fee simple as joint tenants, subject to the prior limitations, and that the plaintiff as heir-at-law of the survivor was now entitled to the whole of the property in fee simple.

The defendants derived title through the heir-at-law of the testator's daughter Mary Parry, who died before her sister Ann Gibbons, and they contended that the testator's two daughters became on his death entitled to the property in fee simple, as tenants in common, subject to the prior limitations, and that

the defendants were now entitled to an undivided moiety of the property in fee simple.

By this action the plaintiff claimed a declaration that he was entitled to the property as from the death of the last tenant for life under the will, who died on January 9, 1900, and consequential relief.

The action was heard before Farwell J. on March 28, 29, 1901.

Upjohn, K.C., and *C. L. Coote*, for the plaintiff, were stopped by the Court.

Butcher, K.C., and *Austen-Cartmell*, for the defendants.

FARWELL J. Notwithstanding the ingenious arguments of Mr. Butcher and Mr. Cartmell, I confess I entertain no doubt on this matter. [His Lordship stated the facts, and continued :—]

If the daughters took as co-parceners, the descent will be traced from each daughter. If they took as joint tenants by devise, then there was no severance of the joint tenancy, and the surviving daughter and the persons claiming through her are entitled to the exclusion of the persons claiming through the other daughter. Now the argument has turned on the 3rd section of the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106). Mr. Butcher's first point was that the Act was intended simply to deal with the case of a man devising to his heir-at-law in fee. He drew a distinction between a man devising to his heir-at-law in fee and a man devising to his own right heirs either mediately or immediately. He distinguished that from the case of a man who devises to "his heirs" generally: in which latter case he said there was an absolute intestacy, or that it was equivalent to a declaration of intestacy. His authority for that is a statement by Mr. Hayes, an eminent conveyancer, at p. 318 of his book on conveyancing, 5th ed. vol. i. The learned author, after referring to the section of the Act, says: "The legal import of a limitation by will to the heirs or right heirs generally, (as distinguished from a devise to the individual heir), of the testator, which does not appear to be altered by the Act, is equivalent to

C. A. 1902 OWEN v. GIBBONS. Farwell J.

a declaration of intestacy as regards the estate to which it applies." Then he refers to the authorities for that proposition. That proposition seemed to me rather astonishing, because, as I understand the law before the Act and as it was read to me from the case of *Pibus* v. *Mitford* (1), a man could not make his right heirs take by purchase, either by conveyance at common law, or by a limitation to uses, or by devise, the rule being that the heir had a better title; and for reasons which I need not consider now (and perhaps it would be difficult to discover them) the estate of the heir by inheritance so far overpowered the devise of the testator as that the devise was inoperative. How that differs from a limitation to the right heirs of the testator so far as any effective operation goes I am wholly unable to see, nor can I see where Mr. Hayes, or his followers Mr. Butcher and Mr. Cartmell, get their declaration of intestacy from. The only authorities cited are the two cases of *Robinson* v. *Knight* (2) and *Amesbury* v. *Brown*. (3) In both those cases the question arose in this way. There was a devise, after previous limita ions, to the right heirs of the testator. There was also a residuary devise. If the devise to his own right heirs had been equivalent to a declaration of intestacy, the residuary devise would have passed the specifically devised estate; but it was held that, so far from being a declaration of intestacy, it was effectual to prevent the residuary devisee from claiming that it was a declaration of intestacy so that they could take. It seems to me, therefore, with all respect, that the two cases which Mr. Hayes cites entirely displace the proposition for which he relies upon them, and so far as I am aware there is absolutely no authority for the proposition, nor can I see any foundation in reason or common sense for it. The rule before the Inheritance Act always was that the testator could not devise to his heir-at-law by reason of the superiority of the estate in the heir-at-law which arose immediately on the testator's death. Then I come to the question of the effect of the Act. The Act undoubtedly was intended to alter this rule, and the 3rd section was passed for

(1) (1674) 1 Vent. 372. (2) (1762) 2 Eden, 155.
(3) (1750) cited 2 Eden, 159.

that very purpose. [His Lordship read s. 3.] Mr. Butcher said, first of all, that that section applied only to the case of a man devising to his heir as distinguished from a devise to his right heirs, for the reason that in the second case it was a mere declaration of intestacy. As I have already said, in my opinion there is no distinction between the two devises and the section applies to both. Then it was said that the devise to the heir does not extend to a devise to the right heirs. But the words of the Act are plain. The Act is intended to apply to any case where, under the words used by the testator, the devise is in effect a devise to the heir or to the person who shall be the heir at the time of the testator's death. It does not mean that the testator must say, "I devise to my heir," but that if the effect of the gift is such as that under it the heir-at-law is the person who would take, and therefore by the old law the gift would be ineffectual, now, under the new law, the heir takes as a devisee and not by descent. When I once get to that the rest follows, because then I have got a devise to persons who are in fact the co-heiresses of the testator. I cannot find any ground whatever for limiting the generality of the enactment, construing it as I have construed it, to the case of a single heir, and not so as to extend to co-heiresses. Whether Mr. Cartmell is right or not in what he stated was the law before the passing of the Inheritance Act, the Legislature has said that the person who takes under a devise, and who turns out to be in fact the heir, is to take not as heir but as devisee, and taking as devisee he takes as a purchaser. Co-parceners obviously cannot take as purchasers. It is stated in Coke upon Littleton, s. 254, in this way: "Note, that none are called parceners by the common law, but females or the heires of females, which come to lands or tenements by discent; for if sisters purchase lands or tenements, of this they are called joyntenants, and not parceners." Therefore, if I once arrive at the conclusion that the section applies to all such devises as I have mentioned, the devisees cannot take in co-parcenary, because co-parcenary only arises under different circumstances; they must take as devisees. Having taken as devisees, I have to construe the devise. I pause here to say,

C. A. 1902 OWEN v. GIBBONS. Farwell J.

as I pointed out during the argument, that the statement in Coke upon Littleton, s. 241, that when "The daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heire to their ancestor," is an additional reason for holding that "heir" means and includes co-parceners as well as the ordinary individual heir, and this is further borne out by the definition in clause 1 of the Act, which says the single shall extend to the plural, and so on. Having once got the devise to the daughters as devisees, then it becomes merely a question of the construction of the devise. I have here a gift to the right heirs, and on the authorities cited it appears to me there are no words of severance, and, therefore, they must take as joint tenants. I can see no way of avoiding a gift to them in joint tenancy.

I am not quite sure that I altogether appreciate the argument rested on s. 4; but s. 4 is quite different from s. 3. In s. 4 the last words are: "and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land." It was argued that I ought to insert in s. 3 similar words after the words "devisee and not by descent"; but I cannot see any ground, on the ordinary principles of construction, for adding to s. 3 words that are not found there because they are found in s. 4, which is applicable to a different subject-matter. The fact that they are in s. 4 appears, if anything, to be against the argument on s. 3, because it shews that the Legislature had the point present to its mind and did insert them in s. 4, but did not insert them in s. 3. The result is that the heir of the surviving daughter takes, and, therefore, the plaintiff is entitled to judgment.

H. L. F.

C. A.

The defendants appealed. The appeal came on for hearing on February 22, 1902.

Butcher, K.C., and *Austen-Cartmell*, for the defendants. Apart from the Inheritance Act, 1833, there can be no doubt that the testator's two daughters would, under the ultimate trust in the will, have taken by descent as co-parceners, and not as joint tenants. The question is whether s. 3 of the Act

has made any difference. It is submitted (1.) that s. 3 does not apply at all to such a case; (2.) that, if it does, though it operates so that the heirs take as devisees and not by descent, yet the quality of the estate which they take is not altered, i.e., in this case the daughters take as tenants in common, not as joint tenants, and the whole property does not descend to the heir of the surviving daughter. (1)

Under the old law, if in a will there was a limitation to the testator's right heirs, the heirs took by descent and not as purchasers: *Counden* v. *Clerke* (2); *Robinson* v. *Knight*. (3) In such a case it is contended that the Act has made no alteration. This was the view of Mr. Hayes. He says in his Introduction to Conveyancing, 5th ed. vol. i. p. 318: "The legal import of a

(1) By s. 1, "The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) . . . . 'the purchaser' shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent . . . . and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

By s. 2, "In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

By s. 3, "When any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

(2) (1613) Hob. (5th ed.) 29.

(3) 2 Eden, 155.

C. A. 1902 OWEN v. GIBBONS.

limitation by will to the heirs or the right heirs generally, . . . which does not appear to be altered by the Act, is equivalent to a declaration of intestacy as regards the estate to which it applies." The same view was taken by Mr. Joshua Williams in his notes to Watkins on Descent, 4th ed. pp. 218, 225. No doubt the opposite view is taken in Jarman on Wills, 5th ed. vol. ii. p. 905, and in Davidson's Conveyancing, 3rd ed. vol. iv. p. 390. There is a marked difference between the words used in the two parts of s. 3. In the first part, which deals with wills, the words are, "to the heir or to the person who shall be the heir of such testator." In the second part, which deals with conveyances, the words are, "to the person or to the heirs of the person who shall thereby have conveyed the same land." In the first part the word "heir" is used; in the second part the word "heirs." There was never any difficulty under the old law as to the effect of a devise simpliciter to the testator's heirs or right heirs; the heirs in such a case always took by descent. But a difficulty often arose when there was a devise to a testator's heir as persona designata, or to a person by name who was in fact the testator's heir. In such a case, if the devisee took under the will precisely the same estate or interest as he would have taken in the absence of a devise to him, he took by descent and not as devisee: Co. Litt. 19th ed. vol. i. 12 b, note 2. If, on the other hand, the devise gave him a different estate or interest, then he took as devisee and not by descent. The first part of s. 3 was aimed at cases of this kind, and was not intended to affect cases of a limitation to a testator's right heirs, in which no such difficulty had ever arisen. The nature of the difficulty which arose when the limitation was to the heir, or to a person who happened to be the heir, is illustrated by such cases as *Scott* v. *Scott* (1); *Mounsey* v. *Blamire* (2); *Anon.* (3); *Clerk* v. *Smith* (4); *Gilpin's Case* (5); *Chaplin* v. *Leroux* (6); *Doe* v. *Timins* (7); *Swaine* v. *Burton.* (8)

(1) (1759) 1 Eden, 458, 462.
(2) (1828) 4 Russ. 384; 28 R. R. 133.
(3) (1595) Cro. Eliz. 431.
(4) (1699) 1 Salk. 241.
(5) (1629) Cro. Car. 161.
(6) (1816) 5 M. & S. 14.
(7) (1818) 1 B. & Al. 530.
(8) (1808) 15 Ves. 365.

But, assuming that s. 3 does apply to the present case, it is contended that it operates only to create a new root of descent, and does not alter the character or quality of the estate. The daughters, if they took by devise, still took as before the Act as tenants in common, not as joint tenants.

In *Cooper* v. *France* (1), in which a question arose upon s. 2 of the Act, Shadwell V.-C. was of opinion that "the meaning of the Act was to leave the law of inheritance, in cases absolutely plain, just as it found them, and only to lay down rules where there was any doubt existing."

[STIRLING L.J. referred to *Strickland* v. *Strickland* (2); *Biederman* v. *Seymour*. (3)]

This point was not considered in *Strickland* v. *Strickland*. (2) A somewhat similar question arose on the construction of s. 4 in *Berens* v. *Fellowes* (4), and some of the observations of Kay J. in that case are in favour of the appellants.

It must be admitted that both the points now raised were decided contrary to the appellants' contention by Stirling J. in *Re Baker*. (5) But in that case the point that s. 3 did not apply at all was not really argued. It was assumed that it did apply, and the point argued was, whether the section altered the quality of the estate taken by the devisee. That decision, of course, does not bind this Court. Sect. 3 does not say that the heirs are to take as purchasers for all purposes.

Upjohn, K.C., and *C. L. Coote*, for the plaintiff, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion, the judgment of Farwell J. ought to be affirmed.

We have listened to a long argument, and, if I thought that, for the decision of this present question, it was necessary thoroughly to master the whole of the law, and the decisions prior to the Inheritance Act, I should not deliver my judgment now. But I do not think that is necessary. We have to

(1) (1850) 19 L. J. (Ch.) 313, 314.

(2) (1839) 10 Sim. 374; 51 R. R. 270.

(3) (1840) 3 Beav. 368; 52 R. R. 155.

(4) (1887) 35 W. R. 356; 56 L. T. 391.

(5) 79 L. T. 343.

C. A. 1902 OWEN v. GIBBONS. Vaughan Williams L.J.

construe the words of the Act, and we must be governed by those words. If we were to take the words of the first part of s. 3 by themselves, I do not suppose any one would contend that the present case is not governed by them, or that the singular words, "to the heir or to the person who shall be the heir of such testator," did not cover the case of a devise to the heirs, or to the person or persons who should be the heirs (in the plural) of the testator. Mr. Butcher did not, I think, contest that. But he said that the construction of the first part of s. 3 ought to be limited, partly because of the words used in the second part, which seem to draw a distinction between the expression "heir or the person who shall be the heir," and the expression "the person or the heirs of the person." Another argument was that we ought to look at the history of the law before the passing of the Act, and find out what was the real difficulty which arose in the decided cases, and then narrow the construction of the words of s. 3, so that they may meet only those cases in which there was a difficulty, and not extend to cases in which there was not. It is said that when such general words as "my own right heirs" were used, there was never any difficulty, because such a devise was also considered as equivalent to an intestacy. It is said that the difficulty arose only when under the words used the heir took as persona designata, and the question was whether the estate given to him by the devise differed either in quantity or quality from that which he would have taken as heir by descent. It is said that the reason, or one of the reasons, for that rule was that the law did not allow a man to take as a gift that which was his without a gift. Those, I think, are the two principal grounds upon which counsel have invited us to give this narrower construction to the words of s. 3. But they also urged that, even if we construe the words of s. 3 in that which I must say is the more natural as well as the wider sense, yet they should not be construed as having any effect beyond that which, it is suggested, was the real object of the Act, namely, to create a new root of descent, and that if effect is given to s. 3 for that purpose, so as to make the heir, whether co-parceners or any one else, take by devise, that is all which

should be done, and the quality of the estate taken by the heir should not be altered, so that, for instance, co-heiresses should take not as co-parceners, but as joint tenants. I think I have shortly summarised the arguments which have been adduced by the appellants' counsel.

With regard to the first point, which is based upon the difference between the words used in the two parts of s. 3, I do not think that difference is sufficient to induce us to adopt the construction suggested by the appellants' counsel. It would, perhaps, be rather misleading to say that the two expressions mean the same thing. They are, in a sense, intended to cover exactly the same ground, but obviously you may describe the same thing in different words according to the point of view from which you regard it. And it seems to me obvious that the Legislature was, in the two parts of the section, regarding the matter to be remedied from different points of view, and I think that is sufficient to account for the difference in the language used.

Then it is said that the section should be so construed as to meet only those cases of difficulty which had arisen before the Act was passed. But, although it may be true, as Mr. Butcher has argued, that the cases which had arisen before the Act related only to wills in which there was, or purported to be, a devise to a particular person, whether described as the testator's heir, or being in fact his heir, yet that was a mere accident. The reason of the rule in either case, whether the devise was to the heir as persona designata or to "my own right heirs," was just the same, namely, that the law did not allow a man to take, or to be compelled to take, by way of gift, that which was his own without any gift. It may be true that that rule was easy of application in some cases, and very difficult of application in others; still, the rule was the same. And, in my judgment, the intention of s. 3 was to abrogate that rule—to abrogate it, it is true, for the purpose of ascertaining in a new way the root of descent, but still to abrogate it.

Then the last point was this, that we ought not to construe s. 3 as doing anything more than alter the mode of arriving

C. A. 1902 OWEN v. GIBBONS. Vaughan Williams L.J.

at the root of descent—that is, the mode itself. I think Mr. Butcher admitted in the course of his argument that that proposition went too far, but still he contended that some limitation should be placed upon the words. He suggested that, notwithstanding s. 3, these co-heiresses, although they take as devisees, yet, for some purposes, ought to be considered co-parceners, and that they take as tenants in common and not as joint tenants. I can see nothing in the words of s. 3 to lead me to that conclusion. There is a distinct decision of my brother Stirling in *Re Baker* (1) to the contrary. The utmost which can be said of the decision of Kay J. in *Berens* v. *Fellowes* (2) is that it left the matter in doubt. That being so, we have really only to consider the words of s. 3, and, before I had considered s. 2, I had arrived at the conclusion that there is nothing to justify such a limitation of the terms of s. 3. But, when I look at s. 2, my former conclusion is very much strengthened. Sect. 2 in effect says that every one who cannot be proved to have taken land by inheritance shall be considered to have been the purchaser thereof. Under s. 3 it cannot be said that these co-heiresses took by inheritance, because they are to take as devisees, and, therefore, it seems to me, that they were purchasers. It is right that I should refer to the observations of Shadwell V.-C. in *Cooper* v. *France*. (3) I do not understand his observations, which have been relied on, to be anything more than obiter dicta; but, whatever he may have meant, it seems to me that he left the present point open, and upon that point I agree with the decision of Farwell J. that these co-heiresses took as devisees—that is, as joint tenants, and not as co-parceners.

STIRLING L.J. I agree. The question is whether, under a gift in a will in trust for the testator's own right heirs, his co-heiresses take as joint tenants or as tenants in common. The will came into operation in 1847, after the passing of the Inheritance Act, and its effect must be governed by that Act. [His Lordship read s. 3, and continued:—]

(1) 79 L. T. 343. (2) 35 W. R. 356; 56 L. T. 391.
(3) 19 L. J. (Ch.) 313.

If before that Act came into operation a will contained a devise, either to the heir of the testator, or to the right heirs of the testator, or to a named person who, at the death of the testator, proved to be his right heir, it was always held that the devise did not take effect, because, as was said, in each of those cases the devisee took by his better title, namely, by descent. The Act provides otherwise in the case of any testator dying after December 31, 1833. We have in the present case a devise in trust for the testator's own right heirs. Who takes under a gift by will in favour of the testator's right heirs? I think the answer must be, the person or persons who, at the death of the testator, answer the description of his heir, or heirs, at common law. It is hardly necessary to cite any authority for that proposition, but if authority is required it may be found in *Garland* v. *Beverley*. (1) That being so, we have to inquire whether such a devise is a devise to the "heir" of the testator within the meaning of s. 3. I can see no reason why it should not be. If there had been a devise by the testator to "my heir," it would certainly have been within the very letter of the enactment. It cannot, in my opinion, make any difference that another letter is added, and that the gift is to "my heirs," instead of "to my heir." I think, therefore, that Farwell J. was well founded in holding that s. 3 applied.

There remains the question, What is the effect of s. 3? The section says that the heir is to be considered to have acquired the land as devisee, and not by descent. He is, therefore, to take as devisee. These co-heiresses, therefore, took as personæ designatæ, and as devisees under the will. That being so, it seems to me they must have taken as joint tenants, and not as tenants in common. If there had been a devise to them by name before the Inheritance Act, they would have taken as joint tenants. That was expressly decided in *Anon.* (2) And it was decided by Shadwell V.-C. in *Strickland* v. *Strickland* (3) upon a question of marshalling that, under this section, persons who take as devisees take as devisees to all intents and purposes. Moreover, co-parcenary is an

(1) (1878) 9 Ch. D. 213. (2) Cro. Eliz. 431.
(3) 10 Sim. 374; 51 R. R. 270.

C. A. 1902 OWEN v. GIBBONS.

incident of an estate taken by descent, and not an incident of an estate taken by purchase. For these reasons, I think that, on this point also, Farwell J. came to the right conclusion. I do not, of course, rely on my own decision in *Re Baker* (1), but I wish to point out that in it the former of the two points was not brought to my attention.

COZENS-HARDY L.J. We are asked to give an unnatural interpretation to the words used by the Legislature in s. 3, on the ground that this particular case might well have been exempted from the generality of the section. I cannot follow this argument. A devise to "my heir," or "upon trust for my heir," is clearly hit by the section. It can make no difference if, instead of "my heir," the words used had been "my right heir." Nor can it in my opinion make any difference if the words are "my right heirs." Each of these three phrases indicates the same person, namely, the common law heir. "Heir" is the strictly proper designation of co-parceners, who together are the heir. I think the will must be construed on the same principles as it would be if the trust had been for "the right heirs of X. Y.," a stranger to whom no estate was given. In that case the right heirs always took as personæ designatæ, i.e., took as devisees: vide Jarman on Wills, 5th ed. vol. ii. p. 906. When once this conclusion is reached, I think it is plain that the co-parceners, who together are the "right heirs," must take as joint tenants. I see no answer to the reasoning of my brother Stirling in *Re Baker*. (1)

Solicitors: *Patersons, Snow & Co., for Longueville & Co., Oswestry; Woodcock Ryland & Parker, for H. C. & A. S. Reynolds, Liverpool.*

(1) 79 L. T. 343.

W. L. C.

BAILY & CO. *v.* CLARK, SON & MORLAND.

C. A.
1900
BYRNE J.
Nov. 16, 17, 20, 21, 22.
1901
Feb. 4.
C. A.
1902
Feb. 24, 25, 27.

[1899 B. 3333.]

Water—Artificial Watercourse—Riparian Proprietors—Right to Use of Water—Nature of Presumed Lost Grant.

In the case of an artificial watercourse, the origin of which is unknown, the proper inference from the user of the water and from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights (including a right to use the water for manufacturing purposes) as they would have had if the stream had been a natural one.

Sutcliffe v. *Booth*, (1863) 32 L. J. (Q.B.) 136, followed.

The use of the water by a riparian proprietor for manufacturing purposes must be, as was laid down in *Miner* v. *Gilmour*, (1858) 12 Moo. P. C. at p. 156, such as not to interfere with the lawful use of the water by the other proprietors, above or below him, or to inflict on them a sensible injury.

The plaintiffs were the owners of a mill, which was situate upon an artificial cut or channel, the water flowing through which was used for working the mill. The water was admitted into the cut from a natural river. The cut was about a mile and a half long, and it rejoined the river at its lower end. The plaintiffs also owned a factory, near to the mill, but a little higher up the stream. For the purposes of the factory the plaintiffs abstracted water from the stream, returning what they abstracted to the stream below the mill.

The defendants owned a factory higher up the stream. For the purposes of the factory they abstracted water from the stream, returning it diminished in quantity by evaporation.

The plaintiffs brought the action to restrain the defendants from abstracting water so as to injure their mill. The plaintiffs claimed a right to the whole of the water in the channel. The artificial stream was known to have existed for some centuries, but there was no evidence as to when or by whom, or on what conditions, it had been originally constructed. The admission of water to the cut had always been under the control of the mill-owner, who had always kept the channel clear and had repaired its banks. The defendants' factory was situate on the site of an old tannery, for the purposes of which water used to be abstracted from the stream, though it was alleged that the defendants had increased the amount abstracted.

There was evidence that there had formerly been a fulling-mill upon the stream above the plaintiffs' mill.

Held, by the Court of Appeal, that the proper inference from the user of the water was that the artificial cut had been originally constructed upon the terms that all the riparian proprietors should have at least the same

C. A.
1902
BAILY & Co.
v.
CLARK, SON & MORLAND.

rights in regard to the use of the water as they would have had if the stream had been a natural one.

The evidence satisfied the Court of Appeal that the abstraction of water by the defendants had not been such as to cause sensible injury to the plaintiffs' mill, and that, therefore, the defendants ought not to be restrained from abstracting water.

Decision of Byrne J. reversed.

THIS action was brought to restrain the defendants from wrongfully polluting a stream and wrongfully abstracting water from it.

The plaintiffs were the owners of a mill, called Beckery Mill, near Glastonbury, situate upon a cut or channel by which a portion of the water of the river Brue was carried, from a place called Clyce Hole, for a distance of about a mile and a half, at the end of which it rejoined the river. This cut or channel was treated by the parties to the action as being an artificial one, and the Court dealt with it on that footing. The cut was known to have existed for some centuries, but there was no evidence as to when or by whom, or under what conditions, it was originally constructed. It was known that a mill had existed for some centuries on the site of the plaintiffs' mill. The inflow of water from the river at Clyce Hole into the cut was regulated by means of an artificial structure with movable boards, which was, and always had been, under the control of the owner of the mill, who had also always kept the channel clear and clean and had maintained and repaired its banks. The plaintiffs also owned a factory, called Beckery Factory, which was situate on the cut, a little higher up than the mill, where they carried on a skin and rug manufacturing business, for the purpose of which they abstracted water from the cut. The water thus abstracted was, after it had been used in the factory, returned into the cut below the plaintiffs' mill. There was evidence that the plaintiffs abstracted as much as 25,000 gallons of water a day for their factory.

The defendants were the owners of a factory, called Northover Factory, also situate on the cut, about 200 yards higher up than the plaintiffs' factory. The defendants carried on the manufacture of sheepskin and other rugs. For the purpose of

their business they abstracted water from the cut, returning it after it had been used into the cut, but considerably diminished in quantity by evaporation. The plaintiffs alleged that the effluent from the defendants' works seriously polluted the water in the cut, and also that the defendants abstracted water to such an extent as seriously to interfere with the flow of water to the plaintiffs' mill and factory. According to the plaintiffs' evidence, the defendants abstracted as much as 8000 gallons of water a day; according to the defendants' evidence, the amount abstracted was very much less. The plaintiffs claimed, as owners both of the mill and the factory, a right to the whole and unpolluted flow of the water of the stream as it entered the cut, for the use of both the mill and the factory.

The defendants had erected their factory upon the site of an old tannery, which they had purchased in 1870. The tannery had existed for many years, and the water of the stream had been used for the purpose of that business. The plaintiffs alleged that the defendants had greatly increased the amount of the abstraction.

The defendants claimed a right by prescription to divert and consume for manufacturing purposes a part of the water of the stream, and to pollute the stream by discharging refuse into it.

There was evidence that there had in ancient times been a fulling-mill situate on the cut above the plaintiffs' mill.

In Collinson's History of Somerset (published in 1791), vol. ii. p. 267, it is stated: "In the terrier of Richard Beere, the last Abbot of Glastonbury but one, we find an account of the state of the town, its government, and other matters, in the time of Henry VIII." This terrier is there quoted, and in it occurs the following passage, p. 268: "There is likewise a new water-mill, situated at Northover, and erected by Abbot Richard, which mill brings in yearly ten pounds. . . . There is another mill called Becary Mill, and a new fulling-mill lately erected by the said Lord Abbot, as also a water-mill in the town, and a wind-mill above it." Richard Beere was abbot (p. 255) from January, 1493, to January, 1524.

There was evidence that the riparian proprietors had been in the habit of using the water of the stream for agricultural

C.A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

purposes, such as watering cattle, as well as for domestic purposes.

Prior to 1866 both Beckery Mill and the site of Beckery Factory belonged to J. G. Bishop. In March, 1866, he conveyed the site of the factory to the plaintiffs. In 1875 Bishop sold the mill to John Baily, and he in 1897 conveyed it to the plaintiffs.

In 1877 John Baily commenced an action against the defendants, complaining of the abstraction of water by them from the stream and the pouring of refuse into it. This action never went to trial, but a compromise was effected, which was carried out by a deed executed in October, 1879, by which the agreement was made determinable on a year's notice. The agreement provided that it was not to prejudice existing rights. The agreement was determined in January, 1899, and the present action was commenced shortly afterwards.

The action came on for hearing before Byrne J. on November 16, 1900.

Rowden, K.C., and *Ward Coldridge*, for the plaintiffs.
Levett, K.C., and *R. Cunningham Glen*, for the defendants.

Cur. adv. vult.

1901. Feb. 4. BYRNE J., after stating the facts, continued:—It is necessary to keep the plaintiffs' claim as mill-owners distinct from their claim as factory-owners, and I propose first to deal with the case as though they claimed only in respect of the mill-owners' title. Before proceeding to deal with the issues of fact it will be convenient to examine some legal points which arise, and I will first read a passage from the decision of the Privy Council in *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1), which appears authoritatively to state the law applicable to riparian owners as contrasted in the cases of natural and artificial watercourses in general terms. In delivering the judgment of the Court, Sir Montague Smith said (2): "There is no doubt that the right

(1) (1878) 4 App. Cas. 121. (2) 4 App. Cas. 126.

to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, primâ facie, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin." In *Kensit* v. *Great Eastern Ry. Co.* (1) Cotton L.J., after citing the passage I have just quoted from the judgment of Sir Montague Smith, proceeded (2): "That is to say, in one case it would be what we call by grant or prescription; in the other case it is a natural right from the natural stream flowing through a man's land which gives him the rights incident to the ownership of the land." In the same judgment Cotton L.J. pointed out that it is impossible to say that any natural rights can ever be acquired in an artificial cut, but added (2): "Possibly after a length of time it might be difficult in some cases to say that a cut was not part of the natural stream." It is also, I think, good law that the rights of a riparian owner may be as extensive in respect of the stream in an artificial cut as they can be in respect of a natural stream: see *Sutcliffe* v. *Booth*. (3) This seems to be a necessary result of the application of the law relating to lost grant. If a lost grant may be inferred from circumstances, I think that if the circumstances lead to such an inference, a lost grant of rights, as good and as extensive as those enjoyed by a riparian owner on a natural stream, may be inferred in favour of an owner on an artificial stream. In like manner, in the case of prescription, to the extent to which prescriptive rights can be acquired, I think that if such rights have been exercised for the period necessary to establish them, they may be as extensive in the case of an artificial stream as in the case of a natural one. In

(1) (1884) 27 Ch. D. 122. (2) 27 Ch. D. 134.
(3) 32 L. J. (Q.B.) 136.

C. A. 1902 BAILY & Co. v. CLARK, SON & MORLAND. Byrne J.

applying the law to the particular case, I do not think that I ought to treat the matter as though the cut were a simple diversion and part of the natural bed of the stream; and I propose to deal with it upon the footing that the cut is artificial, and that the right of the plaintiffs to the flow of the water, and to its reasonable enjoyment, are those in respect of an artificial stream, and must therefore rest upon some grant to be presumed, or upon prescription. So, also, the defendants' right (if any) to use and foul the water must depend upon grant or prescription. In giving the judgment of the Privy Council in the case to which I have referred, Sir Montague Smith, after referring with approval to passages which he cited from *Wood* v. *Waud* (1), *Greatrex* v. *Hayward* (2), and *Sutclife* v. *Booth* (3), proceeded to deal with the facts, and he commenced with the inquiry (4): "What then, is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created, and have been actually enjoyed?" I commence with a similar inquiry—namely, What is the character of the cut and watercourse in question, and what are the circumstances under which they were presumably created and have been enjoyed? No direct evidence has been adduced to shew the actual date when, or the circumstances under which, the artificial cut or watercourse was originally made, or when or under which Beckery Mill was first built. The watercourse has, undoubtedly, existed for a long period, probably for some centuries. Having regard to the nature of the cut and to the existence of the mill, as well as to the actual user of the mill and watercourse so far back as it can be traced, I think it is a right presumption to make that the cut was originally made with the assent of the lower riparian owners on the banks of the river Brue, as and for the purposes of Beckery Mill, not necessarily the present structure, but a mill on the site of and now represented by the mill belonging to the plaintiffs. In other words, I think the watercourse is what is commonly called a mill stream. It may be that when the cut was made the whole of

(1) (1849) 3 Ex. 748, 777.
(2) (1853) 8 Ex. 291, 293.
(3) 32 L. J. (Q.B.) 136.
(4) 4 App. Cas. 128.

the land through which it runs was in one ownership, or it may have been in several. I think I ought to infer a legal origin for it, and a legal right to the uninterrupted flow of the water passing along it for the purposes of the mill in the same condition as it enters the cut. It has been argued for the defendants that the only right of user of the water which ought to be presumed (if any) is a right of user for the purpose of turning the mill-wheel; but I do not accept this view. So far back as living memory extends, and probably always, the miller has lived at the mill, and up to a time within living memory the water of the stream has been used for drinking and domestic purposes. Pester, the miller, who has lived there for thirty-seven years, has himself used it for those purposes in the days before the defendants' factory (Northover) was built. I do not doubt that at the present day, and with modern notions, any reasonable miller would refuse to drink the water, even at the intake from the river, where it is, no doubt, fouler than it formerly was, but I am not at all prepared to say that except for the defendants' operations it might not still be used for some domestic purposes. I do not infer any less right to the unpolluted flow of the stream, as it enters at the intake, because the tenement is a mill than I should have done had it been a tenement without the mill. I think that I ought to presume such a right as the mill-owner would have had by grant, not only for the purposes of affording power, but for the purposes of an inhabited dwelling. I hold, therefore, upon the facts proved, and to be properly inferred or presumed, that, subject to any rights in derogation of the mill-owner's rights (if any) which may since have been acquired by prescription or grant by the defendants or their predecessors in title as superior riparian owners upon the cut, the plaintiffs are now entitled to the unimpeded flow of water in the same condition and in the same volume as it enters the cut, as well for the purposes of driving the mill-wheel, as for the purposes of the mill-owner or occupier, for all purposes appropriate to an inhabited tenement. This involves the right to an unpolluted as well as to an uninterrupted flow, save so far as pollution is due to what takes place prior to the intake from

C. A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

Byrne J.

the river. Before 1866 the mill and the site of the plaintiffs' factory were in common ownership; but in that year the then owner granted the site of the factory to the plaintiffs' predecessors in title for the purpose of building a factory; and they have since about 1867 abstracted water from the stream, and have also polluted it in carrying on their business; but the pollution does not take place above the mill, as the effluent is discharged below it. The mill-owner, having granted a site for a purpose involving a certain abstraction of water, could not complain of it unless exercised in excess of the requirements of the contemplated works; and no surrender of rights beyond that now involved in the grant ought to be inferred. As between the plaintiffs, in their right as factory owners, and the defendants, as superior riparian owners, the plaintiffs could not have acquired a right to the unpolluted and undiminished flow of the stream except by a grant or prescription; and I do not find that they have proved such a right, inasmuch as they have not enjoyed it for the necessary period. If, however, the plaintiffs are entitled in their right as mill-owners, this will incidentally protect them in their business at the factory. The defendants' predecessors acquired the site of their factory at Northover in the year 1870. There was on the property at that time a tannery, and for the purposes of that business the owners of it had been accustomed to withdraw a certain quantity of water from the cut, and had acquired a prescriptive right so to do. [His Lordship referred to the evidence as to the abstract of water for the tannery, and continued:—]

So far as I can judge, the total abstraction of water for the use of the tannery certainly did not exceed 1000 gallons a week, of which a very large proportion, say three-fourths at least, went back into the stream. Of course I can only make a rough approximate estimate from the evidence, but I should think that the water abstracted and not returned to the stream would not exceed 250 to 300 gallons a week for all purposes, allowing for water lost by being taken up in soaking and washing skins. A certain number of skins were soaked in a crate or cage in the stream and skins were washed in the stream to get rid of the lime after unhairing. The lime-pits

used to be emptied in a somewhat unscientific way, and I have no doubt that the effluent water passing into the stream contained a certain proportion of lime; the greater part of the thick lime was kept out and carted away. I think it probable that there was occasionally some other comparatively slight pollution, but it is quite certain that there was nothing to compare, either in amount of water abstracted from the stream or in volume of effluent, with what the defendants are and have been doing. Shortly after acquiring the Northover Tannery and adjoining property the defendants (who are fellmongers and rug manufacturers) erected a factory and works for their business. They have from time to time increased and enlarged their buildings and plant. They employ about ten times as many hands as were formerly employed at the tannery. They take out of the stream, at the most favourable estimate, at least 107,000 gallons a week. There is a considerable difference between the plaintiffs' and defendants' figures, which are but estimates after all, as to the quantity of water taken from and returned to the stream after being used for the various processes; but I think it is certain that the amount consumed or lost in the course of the processes is many thousands of gallons a week more than it was in the time of the old tannery. There is also a direct cause of pollution in the soaking of skins in the stream, and there are several hundred more skins a week soaked by the defendants than in the time of the existence of the old tannery. Water is returned to the stream after being mixed with lime, soda, dye, and other matters, and having been used in dyeing the skins and rugs, and after having been subjected to a purifying process by means of settling in tanks and being treated by a method known as the alumnia ferric process. The comparative purity of the effluent depends upon the efficiency of the purifying system and on the care with which it is worked; and I have to balance the evidence, professional and other, which I have heard. On the whole I have come to the conclusion that there is at times a very considerable fouling of the stream by the defendants' effluent, far beyond any possible fouling which could have been occasioned by the old tannery. On

C. A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

Byrne J.

the question of loss of water power at the mill, I think that the evidence shews a loss of a substantial and material amount of water, caused by the defendants' operations, which does sometimes interfere with the working of the mill in the summer and autumn. It must of course be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it were. If water is abstracted during working hours, and the effluent returned at night, for instance, at a time when the stream is very low, this may well have a very appreciable result in the working of the mill, which might not be noticeable if the reverse process were adopted. But apart from all theories and calculations, from all figures and descriptions of the excellence and infallibility of the process of purification, I am satisfied upon the evidence of what has been seen, felt, and experienced by the witnesses that there is from time to time a very considerable diminution in the flow of the stream, and a very considerable fouling of the stream, and that caused, not merely by operations similar or analogous to those formerly carried on at the old tannery, but also by operations of an entirely different character, as, for instance, dyeing. I think that a right had been acquired by the owners of the old tannery, as against the mill-owner, to abstract water and foul the stream to a certain extent, and had the same business been carried on that right might still have been claimed by the defendants to the same extent, and possibly even to such greater extent as the ordinary reasonable trade development of the old business required, but they are fellmongers and skin-rug manufacturers, and are making use of the stream for these businesses, not for a tannery. At the same time there are certain processes, at all events, such as soaking and washing skins, which, if I have rightly understood the evidence, are common both to the business of a tannery and to those of fellmongers and rug manufacturers; and, having regard to this fact, I am not prepared to say that the defendants are not still entitled as against the plaintiffs to abstract and use the water of the stream and to pollute it for the same process

or processes and to the same extent as it was used and polluted for the purposes of the old tannery, and I propose to limit the injunction in this respect. The injunction is not to come into operation for at least six months, so as to give the defendants time to rearrange their process as far as possible.

W. C. D.

C. A. 1902 BAILY & Co. v. CLARK, SON & MORLAND.

The defendants appealed. The appeal came on for hearing on February 24, 1902.

C. A.

Levett, *K.C.*, and *R. Cunningham Glen*, for the defendants. A grant should be presumed in favour of the defendants. It does not follow that a riparian owner may not have the same rights in an artificial watercourse as in a natural watercourse, for an artificial watercourse may have been made originally under such circumstances, and may have been so used, as to give all the rights which riparian proprietors would have had in a natural watercourse: Bullen and Leake's Precedents of Pleading, 3rd ed. p. 426; *Sutclife* v. *Booth* (1); *Ivimey* v. *Stocker*. (2) No doubt, in general, the rights in a natural and in an artificial watercourse are distinct, for in the former the riparian owner is entitled to the unimpeded flow of water in its natural course; whereas, in the latter, his right must depend on presumed grant or some other legal origin: *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*. (3) Here the defendants are entitled to take water from this stream so far as they do not interfere with the plaintiffs' mill: *Wood* v. *Waud*. (4) There is no evidence that what the defendants have done would have injured the plaintiffs if they had not themselves abstracted water to the extent of 25,000 gallons a days, or 150,000 gallons per week. The plaintiffs are not entitled to have "drinking water" sent down to work their mill. They have no property in the water until it gets down to their land. They have an easement of a certain amount of water from the river Brue through this cut or channel; and so long as that easement is not interfered with, they have no ground of action. The easement which they

(1) 32 L. J. (Q.B.) 136.
(2) (1866) L. R. 1 Ch. 396, 406.
(3) 4 App. Cas. 121, 126.
(4) 3 Ex. 748.

C. A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

possess is a right to sufficient water for the working of their mill. The water passes through the defendants' land, and they are entitled to take as much as they require, provided that in so doing they do not stop the plaintiffs' mill. The plaintiffs have no right to every drop of the water, or to say that the water shall come down to them as "drinking water."

Rowden, K.C., and *Ward Coldridge*, for the plaintiffs. It is submitted that the decision of Byrne J. was right, and that the cases cited by him support his view. Those cases shew that it is in fact possible to acquire in an artificial stream prescriptive rights, those rights being regulated by the form of the presumed grant. In the present case the presumed grant would have been of the quantity of water flowing down the cut; and that is the plaintiffs' prescriptive right. No doubt there might be some lawful infringement of that prescriptive right, for if the business at the Northover Factory had increased, the plaintiffs' right might have been subject to what might have been required by that increase.

[VAUGHAN WILLIAMS L.J. I cannot reconcile myself to the idea that there ever was a grant to you of the right to take 25,000 gallons a day out of the stream. I do not believe myself that there ever was such a grant. I cannot understand the owner of land consenting to a cut being made through his land upon the terms that you could alone carry on business and enjoin any other person from doing so.]

It is contended that the owner of the plaintiffs' mill would have a perfect right to take the 25,000 gallons subject to the rights of any riparian owner below him. There is no allegation in the pleadings that the defendants' rights have been injured or abridged. The plaintiffs' mill being an ancient one, the presumption is that the water flowed along the cut to the mill without any abstraction. As riparian owner, the owner of the mill could himself abstract the water just as if it were a natural stream, so long as no riparian owner below him was injured. The presumed grant was of the whole of the water which flowed down to this ancient mill. The evidence shews that the plaintiffs have not now enough water, and that the abstraction by the defendants is and will be most serious. It

is not, however, necessary for the plaintiffs to prove actual damage: *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.* (1) As owners of the servient tenement we are being subjected to an increased burden, for the defendants have increased their works, their abstraction of water, and their pollution of the stream. It is contended that the plaintiffs, as lower riparian owners, are entitled to have the water coming down to their mill undiminished in quantity and unimpaired in quality: *Young & Co.* v. *Bankier Distillery Co.* (2); *McIntyre Brothers* v. *McGavin* (3); though no doubt that right is subject to ordinary user by the riparian owner above, and also to such further reasonable user by him as may give the riparian owner below him no just cause of complaint: *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (4); *Young & Co.* v. *Bankier Distillery Co.* (2).

The facts that for centuries the owner of the plaintiffs' mill has had the sole control of the stream, and has been subject to the obligation of keeping the channel clear and of repairing the banks so as to prevent flooding, lead necessarily to the inference that the stream is the creature of the mill, and that the mill-owner has greater rights in it than any one else. He has, in fact, an exclusive right—a right to every drop of the water which comes down. Even if the plaintiffs have only the rights of riparian proprietors on a natural stream, the defendants are not entitled to cause a sensible diminution of the water, and the evidence shews that they have done this. No doubt the magnitude of the stream is a matter to be taken into consideration: *Earl of Sandwich* v. *Great Northern Ry. Co.* (5) All other use of water than use for domestic purposes may be called "extraordinary," and it must be reasonable. In that case an extraordinary user was held to be reasonable. In *Wood* v. *Waud* (6) an abstraction of water to the amount of 5 per cent. was held to be a sensible injury. The evidence in the present case shews a sensible injury to the plaintiffs; it

(1) (1874) L. R. 9 Ch. 451.
(2) [1893] A. C. 691, 698.
(3) [1893] A. C. 268, 274, 277.
(4) (1875) L. R. 7 H. L. 697, 704.
(5) (1878) 10 Ch. D. 707, 713.
(6) 3 Ex. 748.

C. A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

proves that there is not sufficient water for the working of the mill.

[VAUGHAN WILLIAMS L.J. referred to *Roberts* v. *Richards* (1), which was compromised on appeal. (2)]

Attorney-General v. *Great Eastern Ry. Co.* (3) illustrates the distinction between a perfectly natural stream and one which is to any extent artificial. No injury is caused to the defendants by reason of the plaintiffs taking 25,000 gallons of water a day for their factory. The defendants cannot on that ground justify what they are doing.

Levett, K.C., was called upon to reply only on the question of pollution. He urged that the evidence did not shew any injury to the plaintiffs' mill by pollution.

VAUGHAN WILLIAMS L.J. In our view there has been an unjustifiable pollution of the stream by the defendants; and, that being so, the injunction, so far as it relates to pollution, must remain. But we have been told that the defendants have acquired some five acres of land which will enable them so to treat the effluent from their works as to prevent any obnoxious discharge into the stream, and we think it right to suspend the injunction for such further time as may be necessary to enable the defendants to complete this alteration.

With regard to the prescriptive right claimed by the defendants, Byrne J. has affirmed it so far as the tannery is concerned. We do not think that in that respect there should be any alteration in his order—that is, in our opinion, no further prescriptive right has been established by the defendants.

I come then to the main point in the case. The case has been argued on both sides upon the basis that the stream in question is an artificial watercourse, and I propose to deal with it on that footing. But I wish to guard myself by saying that I must not be taken to have decided upon the evidence that this is within the meaning of the authorities an artificial watercourse, for I am not quite certain about that. When there is a stream of this kind, which runs out of a river and

(1) (1881) 50 L. J. (Ch.) 297. (2) Vide 51 L. J. (Ch.) 944.
(3) (1871) L. R. 6 Ch. 572, 576.

after making a detour returns into the river lower down, it is, I think, plain that the riparian proprietors on the river itself lower down than the point of return and the riparian proprietors on the backwater stand to each other in the relation of lower and upper riparian proprietors, and I should have thought that the obligations of the upper riparian proprietors, and to a certain extent their privileges, would, as between themselves and the proprietors lower down the river, be the same as those of riparian proprietors upon a natural stream, and that independently of any grant or prescription. I have not, however, to decide that point now; I am only suggesting whether this stream might not be treated as a natural stream, at all events for some purposes, and I have mentioned one of the purposes for which I think it might possibly be so treated. And, indeed, I am not sure that it signifies, as regards the conclusion at which I have arrived in the present case, whether this watercourse be regarded as an artificial or as a natural stream. I shall deal with it as an artificial watercourse. If it were a natural watercourse each riparian proprietor would of course have those rights which were so well stated by Lord Kingsdown in *Miner* v. *Gilmour*. (1) He said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." If, on the other hand, this is an artificial watercourse, any right to the flow of the

(1) 12 Moo. P. C. 131, 156.

C. A. 1902 — BAILY & Co. v. CLARK, SON & MORLAND. — Vaughan Williams L.J.

water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs. This being so, it is plain that the circumstances might be such as properly to lead to the inference that the watercourse was originally constructed on the terms that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream would have, and no more.

An authority for that proposition is to be found in *Sutcliffe* v. *Booth*. (1) As I have already said, it would perhaps be sufficient for the defendants if the rights of the riparian proprietors on this stream were the same as those of riparian proprietors on a natural stream and no more; but it is not necessary to discuss that, for, in my judgment, their rights are somewhat wider; or, to put it in another way, I think it is clear, having regard to the evidence of prior user, that the abstraction of water by the defendants which has taken place has not been a violation of the rights of the plaintiffs as riparian proprietors on this artificial stream. When we look at the evidence, it is plain to my mind that there has been in times past a withdrawal of water from the stream for other than domestic purposes. It is plain that there was a withdrawal of water for the purposes of the old tannery, and, although Byrne J. has allowed the defendants to claim in respect of the tannery the right of abstracting water as a prescriptive right, it seems to me that this right may equally be supported as arising from the conditions under which it must be presumed that the artificial watercourse was originally constructed.

We must also, I think, bear in mind what the user of the water by the plaintiffs themselves has been, and I do not understand it is suggested that their user has been unlawful or inconsistent with the original conditions of the creation of this stream. There is also evidence that, in addition to the Beckery Flour Mills, there was at one time a fulling-mill higher up the

(1) 32 L. J. (Q.B.) 136.

stream. Under these circumstances, I come to the conclusion that this watercourse was originally constructed under such conditions that the water might be withdrawn for manufacturing purposes equally by all the riparian proprietors, provided that the abstraction of water was of reasonable amount. It is, of course, always a difficult matter to say what is the measure of what is reasonableness in such a case; but, speaking for myself, I think you must take into consideration, amongst other things, the size of the stream—that is, the total quantity of water in it, and all the other existing conditions, what other mills and factories there are upon the stream, and also causes of waste and the necessity for the user of the quantity of water which is proved to be used.

The result in my judgment is, that upon the evidence we ought to hold that this watercourse was constructed upon terms giving to all the riparian proprietors equally a right reasonably to withdraw water for manufacturing purposes, and in my opinion there is no proof that the defendants have withdrawn any larger than a reasonable quantity of water. Taking in the strictest way the words of Lord Kingsdown in *Miner* v. *Gilmour* (1)—"But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury"—there is, in my opinion, no evidence upon which we can hold that the defendants have, by reason of the water which they have taken out of the stream and which they have returned to the stream less the amount naturally evaporated, done anything to interfere with the lawful use of the water by the other proprietors, or to inflict upon the plaintiffs a sensible injury. The suggested injury was that the defendants had interfered with the working of the plaintiffs' mill. In my judgment, there is no evidence of that. There is, it is true, some vague evidence that the working of the mill was interfered with by shortness of water. But there is nothing in that evidence inconsistent with that interference having been caused by the withdrawal of, as has been shewn, 25,000 gallons a day by the plaintiffs themselves, of which, be

(1) 12 Moo. P. C. 156.

C. A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

Vaughan Williams L.J.

it observed, none went back into the stream above the mill, the whole of it being discharged below the mill. Under these circumstances, my view is that the abstraction by the defendants of the quantity of water which they are proved to have abstracted and to a large extent returned to the stream was a reasonable user, but that, whether reasonable or not, it has not been proved to have caused any interference with the plaintiffs' mill, or any sensible injury to the plaintiffs as mill-owners.

Then it is said, that even if the proper inference from the circumstances is that by grants from or arrangements with the various riparian proprietors this watercourse was originally constructed upon conditions which give the riparian proprietors rights either a little wider than or at least equal to those of riparian proprietors on a natural stream, still those rights may be subject to some special right of the plaintiffs as mill-owners. It is suggested that the stream was originally constructed expressly for the use of the owner of the plaintiffs' mill. But to my mind the evidence as to the existence of the fulling-mill disposes of that suggestion. I do not say it is impossible that, either by the original grant or by prescription arising from subsequent user, the plaintiffs might have gained paramount rights—rights larger than those of the other riparian proprietors, so that the rights of the other riparian proprietors would be subject to the paramount right of the mill-owner. But, in my judgment, we ought not to infer such a state of things from the evidence before us. I will not attempt to define what evidence would justify the inference of a grant or prescription giving such a paramount right to the owners of this mill, for I am clearly of opinion that no possible inference from the facts of the present case could give the plaintiffs a right to every drop of the water which passes over the weir. This is what the plaintiffs' counsel have really sought to establish. There is nothing in the facts to lead to the conclusion that the plaintiffs' was the only mill upon the stream, or that the stream was constructed for the benefit of that mill only.

Then it is said we ought to draw that inference because there is never as much water in the stream as the plaintiffs'

mill could take and utilise. Assuming that to be true, I do not think we ought to draw such an inference. I am clearly of opinion that there is nothing to justify the inference that the plaintiffs' predecessor had a grant entitling him to the whole of the water coming over the weir. The history of the user seems to me to negative the notion of such a grant. Then, if that was not the grant, what was the grant which the mill-owner had? It may have been a grant of the right to have the water flowing into this watercourse down to the mill, without any interference except by the exercise of the riparian rights of the proprietors higher up the stream. If that is the plaintiffs' right, there is, in my judgment, as I have already said, nothing in the evidence to justify the conclusion that the defendants have in any way interfered with or caused sensible injury to the rights of the plaintiffs as mill-owners. If there has been any material deficiency of water, it is pretty plain that it is attributable rather to the acts of the plaintiffs themselves than to those of any one else.

Under these circumstances we ought, I think, to vary the order of Byrne J., leaving the injunction against the pollution, and negativing any larger prescriptive right than that which is recognised by the order, but discharging the injunction so far as it relates to the abstraction of water.

STIRLING L.J. I am of the same opinion. The question is as to the relative rights of the plaintiffs and the defendants in the user of an artificial watercourse. It is an ancient watercourse, having been in existence for at least 400 years. The plaintiffs are the owners of a flour-mill upon it, and they are also owners of an adjoining factory, which has been only recently erected.

There is no question that the plaintiffs and their predecessors in title have been entitled during that period to the user of the watercourse for the purposes of their flour-mill; and, so far as appears, the mill-owner has had from time immemorial the control of the flow of the water. He has been able, therefore, so to deal with the water as to avail himself of it at such times as he pleased, and in such manner as was beneficial for the working of the mill. He had also, it seems, cast upon him the

C. A. 1902 BAILY & Co. v. CLARK, SON & MORLAND. Stirling L.J.

obligation of cleaning the watercourse and repairing its banks. In that state of things it cannot be doubted that the plaintiffs are entitled to the benefit of the flow of the stream and to a reasonable use of the water, at all events for the purposes of their mill, returning the water after that use to the natural stream, the river Brue. But the plaintiffs are not content with that; they assert that they are entitled to the exclusive use for the purposes of the mill of the whole flow of water along this artificial watercourse.

In dealing with this claim we have to inquire, first, on what principle are rights of this kind to be ascertained. The principle has been laid down in various cases, of which I may mention *Wood* v. *Waud* (1), *Sutcliffe* v. *Booth* (2), and *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*. (3) It appears, I think, from those authorities that you must take into account, first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and, thirdly, the mode in which it has been in fact used and enjoyed. This watercourse is obviously of a permanent character, and there is no question that rights and easements may be acquired in it. As to the circumstances under which it was created we know nothing. It has existed for hundreds of years, but we do not know who at the time of its construction were the owners of the properties which now belong to the plaintiffs and the defendants respectively, or indeed anything about the ownership at that time of any part of the land along the watercourse.

The plaintiffs' mode of using the watercourse for the purposes of their mill has been already stated, and their right was put as high as this: it is said that they are entitled to the use of every pailful of water in the stream, the nature of which it is said is such that every pailful is of importance to the owner of the mill. What has been done by the other owners of property abutting on this watercourse? First of all, the owners of the adjoining properties have, it is stated, used the water for the purpose of watering their cattle, and for the

(1) 3 Ex. 748. (2) 32 L. J. (Q.B.) 136.
(3) 4 App. Cas. 121.

other ordinary purposes for which riparian owners would use a natural stream. Secondly, the defendants, or rather their predecessors in title, were owners of a tannery, on the site of which the defendants' factory now stands, and they used the water for the purposes of their tannery business. Thirdly, the plaintiffs' predecessors in title sold their land, with rights of water, for the erection of a manufactory, and the plaintiffs before they became owners of the mill used and they still use the water for the purposes of their manufactory, and do not now use it exclusively for the purposes of their mill. If the plaintiffs are entitled, as they claim, to the exclusive use of every pailful of water for the purpose of their mill, they are not entitled to use a single pailful for any other purpose. What ought the conclusion to be with regard to these acts of the riparian owners? It seems to me that they ought to be taken primâ facie to have been done in the exercise of a legal right rather than as having been done without any legal title. It ought therefore, I think, to be inferred that the owners of the lands abutting on this watercourse reserved to themselves at the time when the watercourse was constructed the right to a reasonable use of the water as it passed their lands, and that the plaintiffs are in like manner entitled to a similar right—a right to the use of the water for all reasonable purposes, and not merely for the purposes of their mill. In substance, over and above the special use of the water for the purposes of the mill, both the plaintiffs and the other adjoining owners are entitled to those rights to which the owners of lands adjoining a natural stream would be entitled inter se.

If this then be the nature of the plaintiffs' title, have their rights been infringed? Byrne J. came to the conclusion upon the evidence that they had. He said: "I think that the evidence shews a loss of a substantial and material amount of water, caused by the defendants' operations, which does sometimes interfere with the working of the mill in summer and autumn. It must, of course, be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it were. If

C. A. 1902

BAILY & Co. v. CLARK, SON & MORLAND.

Stirling L.J.

water is abstracted during working hours, and the effluent returned at night, for instance, at a time when the stream is very low, this may well have a very appreciable result in the working of the mill, which might not be noticeable if the reverse process were adopted." I have listened with attention to all those passages in the evidence which were relied upon by the learned counsel for the plaintiffs, and I am unable to arrive at the same conclusion as did Byrne J. The defendants' right to use the water is limited by this, that they must not so use it as to cause sensible injury to the plaintiffs. Therefore the plaintiffs, coming here to complain of the defendants' user, must prove sensible injury. Two classes of evidence have been adduced, as in all cases of nuisance. There is, first, what has been termed direct evidence of injury; and, secondly, the evidence of experts and other persons who have not worked the mill, but have paid visits to it and drawn conclusions from what they have seen there. In my opinion, the first class is that which we must regard, at any rate to begin with. I do not say that expert evidence is to be excluded; it is most valuable and useful, if once you arrive at the conclusion that the direct evidence establishes the existence of an injury to the plaintiffs' rights, for the purpose of tracing the origin of the injury to the defendants' operations. But, if the direct evidence of injury is unsatisfactory, it requires, to say the least, very strong expert evidence to prove a case for an injunction. The case then becomes one of a quia timet action to prevent apprehended injury, and there must be very strong evidence to induce the Court to interfere.

[His Lordship referred to the direct evidence of injury, and continued:—]

This direct evidence is far from satisfying me that any sensible injury to the plaintiffs' mill is caused by the defendants' works. If there is any injury, it is to my mind probably caused by the diversion of a large portion of the stream to the plaintiffs' other works. In the expert evidence there is, as usual, great conflict. The defendants' witnesses admit, I think, an abstraction of 1500 gallons of water a day which the defendants do not return into the stream. The plaintiffs' witnesses put the abstraction much higher, and I will assume

that they are right in saying that 8000 gallons a day are taken by the defendants—that is, about one-third of what is taken by the plaintiffs for their works. The minimum flow of the stream is 3,000,000 gallons a day, so that the defendants take about one-fourth per cent. of the stream. That abstraction is not, as it seems to me, sufficient to establish a case entitling the plaintiffs to an injunction in a quia timet action. Byrne J. in his judgment suggests that something may be due to the irregularity with which the water is abstracted and sent down. I am not prepared to say that to take a large quantity of water out of the river at one time and to send it down at another time might not be such an interference with the regular flow of the stream as to cause sensible injury to the plaintiffs, but I have not been able to find any evidence of it in the present case. It is a mere suggestion of the experts, who say that they found a large quantity of water is pounded up, and that this may cause injury to the flow. In my opinion, it is not proved that the defendants have caused any sensible injury to the plaintiffs such as to call for the interference of the Court.

One other matter I desire to mention. It was said by the plaintiffs' counsel that a right is claimed, and that it was not necessary for them to prove any damage. I agree that if they were asserting a title to do a particular thing it would not be necessary for them to prove damage. The defendants by their defence assert specific rights by prescription, but these have not been insisted upon at the bar. The defendants also claim a right to use the stream reasonably, and assert that their acts have been consistent with the reasonable user of the stream. I think when we are varying the judgment of Byrne J. our order should negative any right on the part of the defendants by prescription or otherwise beyond this, that the defendants are entitled to use the water in this watercourse in a reasonable way, not causing any sensible injury to the plaintiffs.

COZENS-HARDY L.J. I entirely agree, and it is only out of respect for the learned judge from whom we are differing that I think it right to add a few words. I feel some doubt whether

C. A. 1902 BAILY & Co. v. CLARK, SON & MORLAND, Cozens-Hardy L.J.

this stream ought not to be regarded as a natural one, having regard to its length, to the great and unknown antiquity of its construction, and to all the other circumstances. But I am content to treat it as an artificial watercourse. That being so, it becomes necessary to consider and ascertain, so far as we can, what mutual rights have been created in the watercourse, or, in other words, what are the terms of the lost grant which from the nature of the case must be presumed to have existed.

The plaintiffs contend that we ought to presume a grant to them of all the water coming over the intake and going thence down to the mill, and that no one else along the course of the stream—considerably more than a mile—has a right to take a pailful of water out of it. That is the construction which I think Byrne J. has adopted. I cannot follow it. It seems to me absolutely inconsistent with all the evidence we have, and with all we know about the origin and user of this artificial cut for many years. On the other hand, the defendants raised a contention which I am equally unable to accept. It was strenuously and ably argued by Mr. Levett that the implied grant to the plaintiffs did not extend to the whole of the water in the artificial channel, but only to so much as was necessary to work the mill. I am quite unable to follow that. It seems to me that the subject-matter of the grant must be all the water which comes into the artificial cut from the intake, and the only difficulty is to ascertain who were the grantees and what were the mutual rights conferred upon the adjacent riparian owners and occupiers.

Now, we know something—not very much, but that something is very interesting—about this watercourse and Beckery Mill. In a matter of this kind we are, of course, entitled to refer to a county history. [His Lordship read the passage above quoted from Collinson's History of Somerset, and continued:—]

From that, I think, it is apparent that this artificial watercourse was used more than 400 years ago, and was probably constructed many hundred years before that. It was certainly used more than 400 years ago, not merely for the purpose of the Beckery Mill—that is, the plaintiffs' mill—but also for the purpose of a fulling-mill on its banks, thus affording a clear

proof of the user of the water of this cut for manufacturing purposes. That is sufficient to negative the foundation of the plaintiffs' argument, namely, that the sole grantee—the only person entitled to the benefit of the lost grant—was the mill-owner. In my judgment the true inference from all the facts is, that the rights of the riparian owners and occupiers must be taken to be the same as they would have been had this been a natural watercourse. I think the evidence shews that the riparian owners and occupiers are entitled to a reasonable use of the water, whether for domestic or for manufacturing purposes. That being so, I entirely agree with my learned brethren that, although there is evidence which would have justified the finding of the learned judge, if we had adopted his view as to the nature of the lost grant, namely, if it had been a grant of all the water in the stream, still I think there is no evidence of the slightest weight to shew that there has been anything more than a reasonable use of the water by the defendants as against the mill-owner and the riparian owner lower down. I am not forgetting the pollution of the water: to that extent the user was not reasonable. What I mean is, that no more than a reasonable quantity of water has been abstracted by the defendants for manufacturing purposes.

For these reasons I think the judgment of the Court below cannot stand, and I entirely adopt the views which have been expressed by my learned brethren.

[The injunction as to pollution was suspended for six months to enable the defendants to complete some alterations which they had commenced for the purpose of preventing pollution of the water.

At the suggestion of the Court the defendants' counsel consented that those words in the order, which allowed them to continue polluting the water to the same extent as it had been polluted by the old tannery, should be omitted.]

Solicitors: *Crowders, Vizard & Oldham, for W. Nixon, Glastonbury; James, Mellor & Co., for Hobbs & Brutton, Portsmouth.*

W. L. C.

KEKEWICH J.

1902

March 13.

GROUND RENT DEVELOPMENT COMPANY, LIMITED *v.* WEST.

[1902 G. 321.]

Land Transfer—Registration—Conditions annexed to Title—Building Restrictions—Modification—Consent—"Persons Principally Interested"—Land Transfer Act, 1875 (38 *& 39 Vict. c.* 87), *s.* 84.

Certain building land in Middlesex, forming part of a larger estate belonging to the defendants and registered with an absolute title, was sold by them to the plaintiff company. The defendants, in order to protect their remaining property, exacted from the company certain restrictive conditions as to the class of houses to be built upon the purchased land and these conditions were registered against the title of the company. The company applied under s. 84 of the Land Transfer Act, 1875, with the consent of the defendants, for an order modifying these conditions by reducing the minimum size and value of the houses. The company had mortgaged the purchased land, and had also sold off several plots to various purchasers, and the defendants had contracted to sell their remaining property. The consent of all parties, except the purchasers of three outlying plots, had been obtained :—

Held, (1.) that the Court ought to accept the consent of the parties interested, if competent to consent, as sufficient proof within s. 84 that the modifications would be beneficial to them; (2.) upon the evidence, that, in the absence of consent, this fact was not proved to the satisfaction of the Court; (3.) that all the persons who took with notice of the conditions were bound by them and were "persons principally interested" in the enforcement of them within the section, and that the order could only be made subject to their consent being obtained.

Observations as to the meaning of "persons principally interested."

This was an application by originating summons under s. 84 of the Land Transfer Act, 1875, for the modification by the Court of certain restrictions registered in the Land Registry against the title of the Ground Rent Development Company to certain building land at Bush Hill Park, Enfield, in the county of Middlesex. Sect. 84 provides for the annexation of conditions to registered land, and it concludes with the following provision : "Nevertheless, any such condition may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that such modification will be beneficial to the persons principally interested in the enforcement of such

condition." This section was amended by the Land Transfer Act, 1897, but the amendment is not material for the present purpose. On September 21, 1899, the company purchased the land in question from the defendants. This land was registered in the Land Registry with an absolute title, and was transferred to the company by an instrument of transfer upon which a land certificate (No. 5321) was issued to the company. The land formed part of a larger estate belonging to the defendants (Title 4510). On the treaty for the purchase by the company the defendants required that certain restrictions should be agreed to, and amongst others (1.) that the frontages of houses east of St. Mark's Road should be not less than sixteen feet, and those west of St. Mark's Road not less than seventeen feet; (2.) that no house should be erected which would cost less than 250*l.*; (3.) that all the plots on which houses should be erected should contain 160 square yards. These restrictions were embodied in the instrument of transfer and were inserted in the land certificate. The defendants were under no obligation to impose these restrictions; but, in view of the fact that they retained other land in the immediate neighbourhood, they thought it desirable that some restrictions as to building should be exacted. The object of the present application was to have these restrictions altered by reducing the minimum building frontages (except in St. Mark's Road) to fifteen feet, the minimum superficial area of the plots to 100 square yards, and the minimum cost of the houses to 200*l.* It was stated in an affidavit filed by the company's solicitor that the proposed alterations would be beneficial to the estate and to the persons interested in enforcing the restrictions, because the houses which had been built with the larger frontages were inhabited by two families who shared one house between them, and it was thought that if the houses were made a little smaller one family only would inhabit each house, and thus a better class of tenant would be secured. The neighbourhood was largely inhabited by the working classes, and the houses to the north of the estate had less frontages than fifteen feet.

The affidavit further stated that the company had obtained the consent of the following gentlemen to the alterations:

KEKEWICH J.
1902
GROUND RENT DEVELOPMENT COMPANY, LIMITED v. WEST.

Mr. J. H. Rafferty, who had contracted to purchase from the defendants the remaining portions of their estate; Mr. W. Tweedy, who previously to the sale to the company had purchased other land in the neighbourhood from the defendants; Messrs. Truman, Hanbury, Buxton & Co., who were the sole incumbrancers on the company's estate, and who joined in this application; Messrs. Burrell & Theobald and Mr. Walter King, who were purchasers from the company of various portions of the estate, and who also joined in the application. The only other purchasers from the company were the purchasers of three outlying plots. Their consent had not been applied for, but it was not expected that they would object. The defendants also consented to the alterations.

Warrington, K.C. (*R. J. Parker* with him), for the plaintiffs. This is an application under s. 84 of the Land Transfer Act, 1875, for the modification of certain conditions registered against the title of the plaintiff company. That the proposed modification will be beneficial to the persons principally interested in the enforcement of the conditions is sufficiently proved by their consent; but, further, it is proved by the evidence that the modification will be beneficial, since it will stop the subdivision of tenements and will thus secure a better class of tenants; and if that is so no consent is necessary.

In this case the only persons principally interested are the plaintiff company and the defendants, and no other consent is required. This is not the case of a building scheme; there are no stipulations to be enforced by the purchaser of one plot against the purchaser of another plot. It is a mere agreement between the vendors and the purchasing company; and the Act gives no force to these conditions other than that contained in the contract.

If any further consent is required the plaintiff company has obtained the consent of all the persons interested except the purchasers of three outlying plots. This modification cannot injure them in any way, and they are not persons principally interested within the section.

O. L. Clare, for the defendants.

KEKEWICH J. By s. 84 of the Land Transfer Act, 1875, a condition once placed upon the register can only be modified or discharged by an order of the Court. That implies that the matter must be looked at from a judicial point of view, and it is to be done on proof to the satisfaction of the Court that such modification will be beneficial to the persons principally interested in the performance of such condition. I must assume that the Legislature anticipated that in hearing applications of this character the Court would be governed by its ordinary rules. One of the ordinary rules of the Court is to accept the consent of parties competent to consent appearing by counsel. There are many cases in which the Court has required the consent of the parties themselves where there is such a departure from the ordinary procedure that one would not presuppose that counsel or solicitors by virtue of their retainer would be able to bind the parties. But in an ordinary case the Court accepts the consent of the parties given by counsel. I cannot think that this provision ought to be construed as excluding that rule when it says that the Court ought to be satisfied that such modifications would be beneficial to the persons interested. If those persons come to the Court and say that they consent, I do not see why the Court should inquire whether their consent has been purchased or given inadvertently, or insist upon proof that that which they testify to be beneficial to them by their consent is in fact beneficial to them. But where no consent is given, the Court has to be satisfied that the modification will be beneficial. The argument has been rather addressed to this—that the proposed modifications cannot do these persons any harm; but that is not enough. The Act requires that the Court shall be satisfied that the modifications will be beneficial, and that ought to be construed strictly. As regards the particular conditions, it is said that this is not the case of a building scheme, and I agree that this is not a building scheme in the ordinary sense of the word, but it is in the nature of a building scheme. These conditions have been placed upon the register, and they constitute a restriction upon the use of this land, and it is possible that any person buying this land with this restriction upon the register may be entitled to say, "I

KEKEWICH J. 1902 GROUND RENT DEVELOPMENT COMPANY, LIMITED v. WEST.

bought the land because I attributed importance to this restriction, and I should not have bought it if this restriction had not been there." The particular restrictions here with regard to the class of houses to be built, frontage, cost, and the area of the plots, may be regarded as of the greatest importance, and my experience of building schemes shews that persons do regard them as of importance. They regard them in the same light as restrictions against the building of public-houses and other matters of a like character. It is said that if the frontage is made narrower and the value of the houses is reduced a better class of tenants will be attracted, because they will occupy the houses themselves instead of sub-letting them. I have no doubt that that is true myself, but I can readily make allowance for other persons taking a different view. They might say that they would rather have tenants who paid a higher rent. That might be a prejudiced or a foolish view, but I do not see how upon the application in this case I can go into the views of these people if they are entitled to object. Then who are entitled to object? The persons principally interested in the enforcement of these conditions. I must assume for this purpose that all the persons who bought with notice of these conditions are interested in the modifications. What the difference is between "interested" and "principally interested" I do not at present understand. I confess I do not understand what is meant by a person "principally interested." Take this example. Suppose I had come to the conclusion that the purchaser of one of these lots, who was originally interested, was a person principally interested, and was therefore a person whose consent must be given or who must be proved to be benefited by the modifications. Suppose that this man has mortgaged a property worth, say, 500*l.* for 100*l.* Who are then the persons principally interested? The mortgagor, or the mortgagee, or both? Suppose then that he has succeeded in mortgaging his property twice in excess of its value. Who are principally interested then? At any rate, both the mortgagees would be principally interested, though it is possible that if the equity of redemption had no value the mortgagor might be disregarded. That illustration has occurred

to me to shew the difficulty in considering that word "principally." At present I do not feel called upon to define the meaning of "principally interested." For the present purpose I think that all the persons having notice of the scheme, which is binding on all persons having notice until modification, are persons principally interested. They are persons who must either consent, or must be proved to be benefited by the modifications. That being the construction I put upon this provision, I must apply it to these various parties. The two vendors are clearly interested, and appear by counsel and consent. Rafferty has purchased a substantial portion of the estate, and is also a person interested. He is prepared to consent. If his name is added to Mr. Clare's brief that will be sufficient; but first his consent must be proved, because I cannot say myself upon the evidence before me that the modifications will be beneficial to him. Tweedy bought before the sale to the plaintiff company, and though he may be interested in fact in the class of houses in the immediate neighbourhood he has no interest in law. If having no covenant, no condition in the building scheme, to help him, he finds a neighbouring proprietor building a house to which he objects, he must put up with it. He is not interested within s. 84. Messrs. Truman, Hanbury & Buxton, who are mortgagees, consent as they join in the application, and Messrs. Burrell & Theobald and Mr. Walter King, who purchased from the plaintiff company, are also parties to the application and consent. Then there are purchasers of three outlying plots, whose consent has not been applied for. Their consent must be obtained. As to one of them it is said that his land is to be made into a road, and it is difficult to see how he will be hurt; but I do not see my way to make any distinction between him and the others and say that he is not a person principally interested. The order will be made upon the consent of Rafferty being proved, and upon obtaining the consents of those purchasers who had not yet consented.

Solicitors: *Thorneycroft & Willis.*

H. B. H.

Distinguished. BIRCH v. TREASURY SOLICITOR [1951] 1 Ch. 298

BYRNE J.

1902

Jan. 21; *Feb.* 14.

In re WESTON. BARTHOLOMEW *v.* MENZIES.

[1901 W. 4788.]

Donatio Mortis Causâ—Building Society Share Certificates—Post Office Savings Bank Deposit-book—Evidence—Delivery.

W. was possessed of eight investment shares in a building society of 25*l.* each, and 130*l.* in the Post Office Savings Bank. Some two months before his death, and while ill in hospital, W. asked the defendant, to whom he was engaged to be married, to go and get the certificates for his building society shares and savings bank book, gave her the key of the drawer in which they were placed, and told her to keep them; the defendant went and obtained the certificates and savings bank book, took them and the key to the hospital, and offered them back to W., when he again said she was to keep them. On several subsequent occasions W. repeated his wish to the defendant that all his property should belong to her in case of his death. The defendant claimed the building society shares and the money standing to the credit of the deceased at the Post Office Savings Bank:—

Held, that the evidence of the defendant was sufficient to establish the gift, if the building society share certificates and savings bank book could be the proper subject-matter of a gift of this kind, and that there had been sufficient delivery to constitute a valid donatio:—

Held, also, that the gift of the building society shares failed as incomplete, but that the Post Office Savings Bank book was capable of being well given so as to create a donatio mortis causâ.

M'Gonnell v. *Murray*, (1869) Ir. R. 3 Eq. 460, distinguished on this point.

ADJOURNED SUMMONS.

This was an application by the administrator of the estate of the above-named Thomas Weston for a declaration that there was no valid and binding donatio mortis causâ by the deceased of his eight shares in the Hearts of Oak Permanent Building Society, or of a sum of 130*l.* in the Post Office Savings Bank, to the defendant Helen Menzies, under the following circumstances.

Thomas Weston had been for many years a butler in domestic service, and had for seven years before his death been engaged to the defendant, who at one time had been his fellow-servant, and it had been arranged that they should be married early in 1901. In February, 1901, Thomas Weston was taken

ill, left his place at Duffield, near Slough, and came up to London, when he went to the National Hospital, Queen's Square. On February 28 the defendant visited Weston in the hospital, when he spoke to her concerning his affairs, telling her that he had eight investment shares of 25*l.* each in the Hearts of Oak Permanent Building Society, and about 130*l.* in the Post Office Savings Bank, which was the whole of his property, with the exception of his wearing apparel, and that if anything should happen to him he wished his uncle, the plaintiff, to have 100*l.*, and all the rest was for her, as he had saved it for her, and wished her to have it. On March 7 the defendant again saw Weston at the hospital, when he asked her to go to Duffield and get the building society share certificates and the Post Office Savings Bank book, gave her the key of the drawer in his bedroom in which they were kept and told her that she was to keep them. The defendant went down to Duffield two days after this interview and obtained the investment share certificates and the savings bank book, which she took the next day to the hospital, telling Weston she had brought the documents, and offering him back the key, when he again told her she was to keep them. On March 14 the defendant again visited Weston in company with a friend, in whose presence he again repeated his wishes that all his property, with the exception of 100*l.* to his uncle, should belong to the defendant in case of his death. On several other subsequent occasions when the defendant saw Weston he repeated his wishes that all his property should go to her. On May 1, 1901, Thomas Weston died, and letters of administration to his estate were granted to his uncle, the plaintiff, by whom the present proceedings were commenced for the purpose of obtaining the decision of the Court, whether in the above circumstances there had been a valid donatio mortis causâ of the building society shares, and the money standing to the deceased's credit at the Post Office Savings Bank.

The evidence in support of the gift rested entirely on the affidavit of the defendant, the only corroboration of her story being an affidavit of the friend as to what passed at the interview of March 14.

BYRNE J.
1902
WESTON, *In re.* BARTHOLOMEW *v.* MENZIES.

By the rules of the Hearts of Oak Permanent Building Society the shares of the society consisted of two classes—investment shares and loan shares: each investment share was to be of the ultimate value of 25*l*. By rule 66, on an investment share being fully paid up, the member entitled thereto was to receive, in lieu of the pass-book, a share certificate. By rule 74 any member holding an investment share might withdraw it on giving to the society one month's notice in writing of his intention so to do. By rule 99 any member, on application to the secretary, stating the name, occupation, and address of the proposed transferee, might transfer any investment share held by him; the instrument of transfer to be in the form prescribed in the schedule; all transfers were to be registered. Rule 101 provided that on the death of any member his personal representatives should, subject to s. 29 of the Building Societies Act, 1874 (which provides for payment of sums not exceeding 50*l*. to persons appearing to be the next of kin of an intestate member), be entitled to his investment shares on production to the secretary of the probate of his will or letters of administration and payment of a transfer fee of 6*d*. per share. The following were the principal regulations in the Post Office Savings Bank book relied on: "This book must be produced whenever any money is deposited or withdrawn." Rule 1 stating the amounts receivable and the interest allowed to depositors. Rule 4: "Every deposit in a Post Office Savings Bank must be immediately entered by the postmaster or other person receiving it in the depositor's book, and the postmaster or other person receiving the deposit must affix his signature and the stamp of his office to each entry." Rule 7, as to manner in which withdrawals are to be made, which provides that the warrant for withdrawal must be presented by the depositor at the post-office "together with the depositor's book."

J. A. Hay, for the plaintiff, stated the facts, and submitted the evidence to the Court.

Lyttelton Chubb, for the defendant. A donatio mortis causâ can be established by the uncorroborated evidence of the

donee: *In re Farman.* (1) In the present case there is some corroboration by the evidence of the friend who accompanied the donee at the interview of March 14. With reference to the building society share certificates, I admit that a gift of a certificate of ordinary shares would not be sufficient; but in the present case these shares are not like ordinary shares: they may be withdrawn at any time on notice, and then the holder of an investment share ceases to be a member; in the case of ordinary shares, the holder only ceases to be a member by transfer and assignment.

[BYRNE J. Is not the true test this—Has the donor done all in his power to transfer the property?]

Duffield v. *Elwes* (2) seems to shew that that is not the true test, because in that case the subject of the gift was a conveyance and a deed of assignment of a mortgage debt, and a mere delivery of these was held sufficient. The fact that no transfer of these shares was executed is therefore immaterial. These certificates represent a sum of money which the donor had power to obtain repayment of at any time, and do not represent a share in the undertaking, and are a proper subject for a gift of this kind. As to to the savings bank book, the regulations as to interest are very similar to the usual rule as to interest on a deposit-note, which can be the proper subject of a donatio mortis causâ: *In re Dillon.* (3) The book shews the terms of the contract between the parties, as well as being a receipt for the money due: *Moore* v. *Darton.* (4)

M'Gonnell v. *Murray* (5) is inconsistent with these authorities; the bank-book in that case was not a Post Office Savings Bank book. Delivery of the bank-book in this case is sufficient to pass the right to the money on deposit.

J. H. Jackson, for next of kin. This bank-book is merely the evidence of a debt, and will not pass by delivery the right to receive the money any more than a delivery of receipts for stock—*Ward* v. *Turner* (6)—or of certificates for railway stock—

(1) (1887) 58 L. T. 12.
(2) (1827) 1 Bli. (N.S.) 497; 30 R. R. 69.
(3) (1890) 44 Ch. D. 76.
(4) (1851) 4 De G. & Sm. 517.
(5) Ir. R. 3 Eq. 460.
(6) (1752) 2 Ves. Sen. 431, 443.

BYRNE J. 1902 WESTON, *In re.* BARTHOLOMEW *v.* MENZIES.

Moore v. *Moore* (1)—will pass the right to receive the stock. I rely on *M'Gonnell* v. *Murray* (2), which was approved of in *Duckworth* v. *Lee*. (3) In *In re Beak's Estate* (4) a gift of a cheque accompanied by a delivery of the banker's pass-book was held not to be a good donatio mortis causâ. The Post Office Savings Bank book is nothing more than a pass-book. The building society shares stand on the same footing as any other shares, and cannot pass by mere delivery. The defendant's claim depends entirely on her own evidence.

[BYRNE J. There has been no cross-examination: why should I not believe her story? It is a very natural one.]

The gift should, to be a good gift, be made in expectation of death: *Cosnahan* v. *Grice*. (5) In this case many weeks elapsed between the gift and the death; the expression "if anything should happen to me" implies a hope of recovery, not an immediate expectation of death. Neither the certificates nor the bank-book are the proper subjects of a gift of this kind, and they were not delivered in expectation of death.

Lyttelton Chubb, in reply.

Cur. adv. vult.

Feb. 14. BYRNE J., after a short statement of the circumstances under which the question was raised, found as a fact that there was corroboration of the defendant's evidence which, though it should be carefully scanned, was, in his opinion, sufficient to establish the gifts, if the building society shares and the savings bank book could be the proper subject-matter of a donatio mortis causâ. His Lordship then continued:—There is another matter I may mention, which is, whether there had been a proper traditio at the time this gift was made; but on referring to *Cain* v. *Moon* (6) I am of opinion that it is not essential that the traditio should be at the actual moment of the gift; in that case the original delivery had been made alio intuitu, and yet it was held to be sufficient; and I therefore come to the conclusion that in the circumstances of this case

(1) (1874) L. R. 18 Eq. 474.
(2) Ir. R. 3 Eq. 460.
(3) [1899] 1 I. R. 405, 408.
(4) (1872) L. R. 13 Eq. 489.
(5) (1862) 15 Moo. P. C. 215.
(6) [1896] 2 Q. B. 283.

there has been a sufficient traditio to the defendant. Two questions have been argued, one as to the certificates of the building society shares, and the other as to the Post Office Savings Bank book. With reference to the building society shares I am of opinion that they are not the proper subject-matter of a donatio mortis causâ; I am not able to distinguish the subject-matter of this gift from that of an ordinary certificate of railway stock, like that which was dealt with in *Moore* v. *Moore* (1), and the mere fact that under the rules of the society there was a power to withdraw these investment shares at any time, and obtain the money for them, is not sufficient to differentiate the present case from *Moore* v. *Moore*. (1) With reference to the remaining question, as to the gift of the savings bank book, ever since the decision of the Court of Appeal in the case of *In re Dillon* (2), it is well established that a banker's deposit receipt in a form shewing the terms of the contract and being more than an acknowledgment for the receipt of money is good subject for a donatio mortis causâ. The question had not previously come before a Court of Appeal in England, although there had been, as stated by Cotton L.J. in the last-mentioned case, a current of decisions in Courts of first instance in England in favour of that view, and a decision of the Exchequer Division in Ireland, *Cassidy* v. *Belfast Banking Co.* (3), to a similar effect. In the present case the question arises in reference to a Post Office Savings Bank deposit-book, and, in considering whether or not this is a good subject of a donatio mortis causâ, the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shews what the contract between the parties is. See *Moore* v. *Darton* (4), and the judgment of Cotton L.J. in *In re Dillon*. (5) An examination of the savings bank book in the present case appears to me to shew a fulfilment of the test; and although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere

(1) L. R. 18 Eq. 474.
(2) 44 Ch. D. 76.
(3) (1887) 22 L. R. Ir. 68.
(4) 4 De G. & Sm. 517.
(5) 44 Ch. D. 82.

BYRNE J.
1902
WESTON, *In re.* BARTHOLOMEW *v.* MENZIES.

receipt. It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the Savings Bank Department. Apart from authority pointing the other way, I should have considered it impossible, after comparing the terms of the deposit receipts in the cases of *In re Dillon* (1) and *Moore* v. *Darton* (2) with the savings bank book, to hold that the latter is not a good subject for donatio mortis causâ. The case in Ireland of *M'Gonnell* v. *Murray* (3) (which appears to be the only reported case dealing with a savings bank book) was relied upon as an authority to the contrary; and since the argument I have referred also to the case of *Duckworth* v. *Lee* (4), in the Court of Appeal in Ireland. The latter case dealt with the gift of an I.O.U., and had no reference to a savings bank book, and, consequently, the actual decision in *M'Gonnell* v. *Murray* (3) did not come in question; but the general reasoning in *M'Gonnell* v. *Murray* (3), including an expression of disagreement with a dictum of Lord Romilly's in *Hewitt* v. *Kaye* (5), appears to have been treated with approval by some of the judges, and the Lord Chancellor of Ireland expressly states that he sees nothing in the case of *In re Dillon* (1) to shake the authority of *M'Gonnell* v. *Murray*. (3) It is necessary, therefore, to consider carefully what the decision in *M'Gonnell* v. *Murray* (3) actually was. It was not necessary to decide the point in the view the Master of the Rolls took of the facts; but it was, in fact, decided that the savings bank book in question in that case was not capable of being given mortis causâ so as to confer a right upon the donee to the amount of the deposit. The point there arose, not as to the book of a depositor under the Post Office Savings Bank Act, 1861 (24 & 25 Vict. c. 14), but as to the book of a depositor in a private savings bank governed by the provisions of the General Savings Bank Act of 1863 (26 & 27 Vict. c. 87), Acts which differ con-

(1) 44 Ch. D. 76.
(2) 4 De G. & Sm. 517.
(3) Ir. R. 3 Eq. 460.
(4) [1899] 1 I. R. 405.
(5) (1868) L. R. 6 Eq. 198.

siderably in their terms. The only rules of the savings bank apparently relied on in *M'Gonnell* v. *Murray* (1) are those set out at p. 463 of the report, and I do not find that it was part of the contract, as it was in the present case, that the book must be produced whenever any money is deposited or withdrawn, nor does it appear that there was any stipulation corresponding with that in the Post Office Savings Bank book to the effect that every deposit must be immediately entered by the postmaster or other person receiving it in the depositor's book, and that the postmaster or other person receiving the deposit must affix his signature and the stamp of his office to each entry. In *M'Gonnell* v. *Murray* (1) the Master of the Rolls says that he does not find in the Savings Bank Acts (meaning, according to the reference in the report, the Act 26 & 27 Vict. c. 87) anything to distinguish a savings bank pass-book from an ordinary banker's pass-book; and he also takes the view that the book did not embody the terms of the contract between the depositor and the bank, and, further, that it was merely evidence of, or a voucher for, a debt. It appears to me that the book in *M'Gonnell* v. *Murray* (1) was, in the view taken of it by the Court, of a different nature from that with which I have to deal. I am quite unable to say that the Post Office Savings Bank book is not distinguishable from an ordinary banker's pass-book, and I think it is clearly more than evidence of, or a voucher for, the debt, and I do not see how I can, consistently with the cases of *Moore* v. *Darton* (2) and *In re Dillon* (3), do otherwise than hold the book to be capable of being well given so as to create a donatio mortis causâ.

Solicitors: *Paterson, Candler & Sykes, for A. J. Ellis, Maidstone*; *W. W. Young, Son & Ward.*

(1) Ir. R. 3 Eq. 460. (2) 4 De G. & Sm. 517.
(3) 44 Ch. D. 76.

W. C. D.

FARWELL J.

1902

Jan. 16, 17, 25.

F. *v.* F. (1)

[1901 F. 1029.]

Ward of Court—Testamentary Guardian—Guardian's Change of Religion—Removal of Guardian.

A testator, who died in 1896, by his will appointed his sister guardian of his infant daughter, then aged eleven. The testator was a Protestant, and the infant was brought up in that faith. In 1900 the sister, from conscientious motives, became a Roman Catholic:—

Held, that, under the circumstances, it was for the benefit of the infant that the testator's sister should be removed from her guardianship.

THIS was an action to administer the trusts of the will of a testator who died in 1896, and the present application was a summons for the removal of the testamentary guardian of the infant daughter of the testator, under these circumstances.

The testator by his will appointed his sister sole executrix and trustee of his will, and also guardian of his infant daughter. The infant was born in 1885. Her mother died in 1888. Under the will of the testator, and also under his marriage settlement, the infant was entitled to considerable property. The testator was a Protestant, and the infant was brought up in that faith. In 1900 the testator's sister, who had previously been a Protestant, became a Roman Catholic. The infant by her next friend now applied that the testator's sister might be removed from her office of guardian, and that two named persons (relatives of the infant) might be appointed guardians in her place. The evidence is sufficiently noticed in the judgment.

Jenkins, K.C., and *Method*, for the application.

Bramwell Davis, K.C., and *Mark Romer*, for the testator's sister.

Cur. adv. vult.

Jan. 25. FARWELL J. This is an application by a female ward of Court by her next friend to remove the guardian

(1) This case was heard in camerâ, and is reported by leave of the Court.

FARWELL J. 1902 F. v. F.

appointed by the will of her father from the guardianship. The ward was born in December, 1885, and is therefore sixteen. Her mother predeceased her father, and the latter died on March 23, 1896, having made a will dated March 18, 1896, by which he appointed his sister sole executrix and trustee of his estate, and guardian of the infant. The infant has a considerable fortune under the father's will, and also under the settlements made on his marriage. The father was a Protestant with Evangelical views. In the year 1900 the guardian became a Roman Catholic, but out of consideration for the feelings of the ward, who was then in course of preparation for confirmation, kept the fact a secret from the ward until after she had been confirmed on March 19, 1901. I desire to state in the clearest manner that no sort of imputation is or can be made against the guardian. She has done her duty to the child in an exemplary manner, but the contention is that her change of religion has rendered it expedient, and indeed essential, for the benefit of the ward that she should no longer act as her guardian. The ward has since her father's death lived with her guardian at the house of her grandfather, and has had a resident governess, who is a German lady and a Lutheran. The conclusion I have come to on the evidence is that the ward was a good deal agitated and upset by her aunt's change of religion, and she expressed to me when I saw her in my private room a strong dislike to the idea of remaining under her charge; but it is not easy to say how far this dislike is due to the guardian's change of religion, or how far it is merely ephemeral in its nature. The principles on which the Court acts in cases of this description are well settled: (*a*) The father's religion is primâ facie the infant's religion, religio sequitur patrem, and the guardian's duty is to see that the ward is brought up in that religion, and is protected against disturbing influences by persons holding the tenets of a different faith: *In re Newbery* (1); *In re Besant.* (2) (*b*) The Court in considering the question of guardianship has regard before all things to the infant's welfare; it has regard, of course, to the rights of the father

(1) (1866) L. R. 1 Ch. 263. (2) (1879) 11 Ch. D. 508, 519.

FARWELL J. 1902 F. v. F.

and the mother, but the essential requirements of the infant are paramount: *In re Curtis.* (1) (*c*) It is by no means in cases of misconduct only that the Court interferes to remove a guardian. Thus in *In re X.* (2), which was cited as an authority in favour of the guardian, but which really has no application, the Court of Appeal held on the facts that there was nothing calculated to prejudice the infant in that case, and Vaughan Williams L.J. (3) says: "It is not in any way intended to say by our decision to-day that that is a power which could only be exercised in cases in which some moral reflection or slur is cast upon the mother. I can conceive all sorts of cases in which it might be under this Act" (i.e., the Guardianship of Infants Act, 1886) "fit that the Court should exercise this power, although there might not be any moral reflection of any sort or kind on the wife—that is to say, cases in which it was obviously for the interests of the child that the power of appointing a joint guardian should be exercised." These observations apply as well to the removal of a guardian as to the application of a joint guardian, for these are only two different modes of interference by the Court. I have dwelt on this because it has been pressed upon me that I shall be casting a slur on the guardian if I remove her, and I desire to state clearly that there is no sort of imputation against her. She has from conscientious motives thought fit to change her religion, and the sole question for me is whether, under these altered circumstances, it is for the benefit of the ward that she should remain guardian. A lady who is appointed guardian to a girl, who has neither father nor mother, is called upon so far as possible to fill the place of the parents. One of the first and most sacred duties of the parents is to imbue the mind of the child with some religious belief, and this is done, not merely by precept and instruction, but by the unconscious influence of everyday life and conduct. The child is entitled to this care and to the opportunity of resorting to the guardian for assistance and instruction in the doubts and difficulties that assail the youthful mind, and that usually become more marked

(1) (1859) 28 L. J. (Ch.) 458. (2) [1899] 1 Ch. 526.
(3) [1899] 1 Ch. 535.

and urgent as she develops from girlhood to womanhood. But if the guardian changes her religion, she deprives the ward of this protection and refuge. I lay aside the difficulty that a conscientious Roman Catholic might feel in refraining from attempting to influence the ward to adopt that faith in which alone, according to the guardian's belief, salvation can be found. I accept the guardian's assurance that she has not attempted and will not attempt in any way to influence the ward; but this means that the subject of religion is excluded from their conversations, and that the ward is deprived of all the protection and assistance in religious matters which she is entitled to expect from her guardian. Further than this, the disturbing influence arising from the sight of the guardian worshipping in a different church and consulting the priests of another faith may well be prejudicial to the ward's peace of mind and secure confidence in her own religious belief. I do not say that the mere change of religion in all cases and under all circumstances is sufficient to justify the removal of a guardian, but I do say and hold that such a change of religion as is calculated in the opinion of the Court seriously to prejudice the ward in the manner that I have already pointed out imposes on the Court the duty of interfering; and as I am of opinion that in the present case the ward will be prejudiced by the continuance of the guardian, and, as the arrangement suggested on behalf of the applicant (of a joint guardian with certain provisions as to residence, teaching, &c.) has been declined by the guardian, I make the order for her removal in the form set out in Seton, 6th ed. p. 1038, No. 12. (1)

Solicitors: *Rowcliffes, Rawle & Co.; Greenfield & Co.*

(1) An appeal was presented, but, after some discussion, the arrangement above referred to was accepted by the guardian and approved by the Court.

H. L. F.

FARWELL J.
1902
Feb. 24.

In re CHETWYND'S SETTLEMENT. SCARISBRICK *v.* NEVINSON.

[1901 C. 2387.]

Trustee—Discharge—No new Trustee Appointed—Administration Action—Jurisdiction—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 25.

In an action to administer a trust the Court has jurisdiction to discharge a trustee without appointing a new trustee in his place.

Courtenay v. *Courtenay*, (1846) 3 J. & Lat. 519, 533, followed.

This cannot be done under s. 25 of the Trustee Act, 1893, as it is not the practice to reappoint continuing trustees in place of themselves and a retiring trustee.

In re Aston, (1883) 23 Ch. D. 217, applied.

ORIGINATING SUMMONS.

This was a summons by one of four trustees of a settlement asking that he might be discharged from his trusteeship, and that so far as necessary the trusts of the settlement might be administered. The summons had originally asked for an order under s. 25 of the Trustee Act, 1893, but, there being no jurisdiction to make the order under that section, the summons was amended by adding all parties interested, and asking for administration of the trusts.

The applicant, who was upwards of sixty years of age, had been a trustee for ten years. Being no longer in good health, he desired to be relieved from the responsibility of the trusteeship, and, a difficulty having arisen in carrying the matter through without the intervention of the Court, this summons was issued.

The summons was not opposed, the only question being whether the Court had jurisdiction to make the order.

F. R. Finch, for the applicant. In an action to administer a trust the Court has jurisdiction to discharge a trustee without appointing a new trustee in his place: *Courtenay* v. *Courtenay* (1); Lewin on Trusts, 10th ed. p. 793.

J. T. Prior, for the continuing trustees.

(1) 3 J. & Lat. 519, 533.

S. Leeke, for the infant remaindermen.

The life tenants did not appear at the hearing.

FARWELL J. This matter originally came before me in chambers as an application under s. 25 of the Trustee Act, 1893. I then was and still am of opinion that the Court cannot discharge a trustee under that section unless it can at the same time reappoint the continuing trustees in place of themselves and the retiring trustee. There was a considerable conflict of opinion on this point under the corresponding section of the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 32. In *In re Harford's Trusts* (1) (a Chancery case), Jessel M.R. thought it could be done, and made an order accordingly; but in *In re Aston* (2) (a Lunacy case), while adhering to his former opinion, he refused to make a similar order in deference to the decision of Cotton L.J. in *In re Colyer* (3) (a Lunacy case), so as to secure uniformity of practice in the Chancery Division and Lunacy; and Lindley and Bowen L.JJ. concurred in this refusal. Either, therefore, from want of jurisdiction or from refusal to exercise it, the Court did not in fact discharge trustees under the Trustee Act, 1850, without appointing new trustees in their place; and the same practice must obtain under the Trustee Act, 1893.

I suggested that, in an action to administer a trust, the Court always had inherent jurisdiction to discharge a trustee without appointing a new trustee in his place, and the summons was accordingly amended by joining all parties interested and asking for administration.

In *Courtenay* v. *Courtenay* (4) Sugden L.C. says: "It is quite a mistake to suppose that a trustee who is entitled to be discharged from his trust is bound to shew to the Court that there is some other person ready to accept the trust. The Court refers it to the master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court, and not discharge him. The Court will, however, take care that the trustee shall not suffer thereby."

(1) (1879) 13 Ch. D. 135.
(2) 23 Ch. D. 217.
(3) W. N. (1880) 131.
(4) 3 J. & Lat. 519, 533.

FARWELL J.
1902
CHETWYND'S SETTLEMENT, *In re.*
SCARISBRICK *v.* NEVINSON.

He is obviously referring to the case of a sole trustee being desirous of retiring, or to a case in which it is for any reason undesirable that the continuing trustees should act alone. Unless, therefore, a trustee desires to retire "from mere caprice or other trivial cause," his right to retire does not depend on the question whether another person is ready to accept the office, though it may sometimes be necessary to keep him before the Court.

I am not troubled with any such consideration here, as there are three continuing trustees. The applicant, who is upwards of sixty years of age, has been a trustee for ten years. His wish to retire is quite reasonable. No trustee accepts the responsibility for the term of his natural life, or for more than a reasonable period.

As regards the propriety of discharging a trustee without appointing a new trustee, I may observe that there is a quasi-legislative sanction for it under s. 11 of the Trustee Act, 1893, which enables the co-trustees and the person empowered to appoint trustees to effect such a discharge by deed.

I therefore feel no difficulty in exercising my jurisdiction, and discharging the applicant from his trusteeship without appointing a new trustee.

Solicitors: *Rowcliffes, Rawle & Co, for Finch, Johnson & Finch, Preston and Blackpool; Lethbridge & Prior.*

G. R. A.

In re S. ABRAHAMS & SONS.

BUCKLEY J.

1902

Feb. 17, 18.

[00347 of 1901.]

Company — Debenture — Registration — Extending Time — Application after Commencement of Winding-up.

The directors of a company in 1898 resolved to raise 5500*l.* on debentures of 100*l.* each charging the company's assets, including its uncalled capital, and ranking pari passu. Before January 1, 1901 (the date of commencement of the Companies Act, 1900), fifty of the debentures were issued. The remaining five debentures were issued to D. in July, 1901. D. never registered his debentures, having been advised by his solicitor (who had considered the provisions of the Act of 1900) that registration was unnecessary. In October, 1901, the company passed an extraordinary resolution for voluntary winding-up, and subsequently D. applied, under s. 15 of the Act, for an order extending the time for registration of his debentures. The assets were valued at 5030*l.*, without providing for costs:—

Held, that, although the omission to register was not "accidental" or "due to inadventence" within the meaning of s. 15, it was due "to some other sufficient cause"; but that it would be unjust to the other creditors to grant the extension of time without qualifying the order as in *In re Joplin Brewery Co.*, ante, p. 79, and that to make an order in that form in a case where the winding-up of the company had commenced could not benefit any one.

The application was accordingly dismissed.

THE company, S. Abrahams & Sons, Limited, was incorporated in October, 1898, and on November 4, 1898, its directors passed the following resolution: "Resolved that the sum of 5500*l.* be raised by the issue of fifty-five 100*l.* debentures, payable in five years, bearing interest at 5*l.* per cent. per annum charged upon the company's property and assets, including its uncalled capital, interest on the said debentures to be paid from the date of issue of the same."

Before January 1, 1901 (when the Companies Act, 1900, came into operation), the company issued fifty of the debentures. These debentures and the five debentures mentioned below were all in the same form, and each of them gave a charge on the undertaking and assets of the company, including its uncalled capital, and stated that all the debentures of the series ranked pari passu.

BUCKLEY J.
1902
S. ABRAHAMS & SONS, *In re.*

In July, 1901, the company issued the remaining five debentures to Edgar Davis. He at once consulted a solicitor, who, according to his evidence, "on perusing the Companies Act, 1900 . . . . came to the conclusion that, as these debentures formed part of a series of debentures, the only thing for the registration of which the Act provided was the resolution creating the series, and that, as the resolution was passed in 1898, before the commencement of the Companies Act, 1900, nothing required to be registered under the Act," and that he "so advised the said Edgar Davis." The five debentures were never registered under the Act of 1900.

On October 16, 1901, the company passed an extraordinary resolution for voluntary winding-up, and appointed a liquidator; and on November 13, 1901, Davis took out an originating summons asking for an order that the time for registering the five debentures might be extended so as to enable them to be registered in accordance with s. 14 of the Act of 1900.

There was evidence that the value of the company's assets was about 5030*l.*, without providing for the costs of the winding-up or of a pending action to enforce the debentures.

Peterson, in support of the application. The assets of the company are insufficient to pay the debenture-holders and the costs, and therefore the unsecured creditors cannot get anything. The order—even if made without the insertion of the words "but that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered" which were inserted in *In re Joplin Brewery Co.* (1)—will not prejudice the unsecured creditors.

The holders of the other debentures, which did not require registration, cannot complain if the order for extension of time is an unqualified one, for all the fifty-five debentures belong to one series, and each debenture-holder takes his debenture on the footing that all the debentures of the series rank pari passu.

(1) Ante, p. 79.

[BUCKLEY J. Is that accurate? The words of the debenture only mean that such of the debentures as are validly issued are to rank pari passu.]

Registration was not required under the Companies Act, 1900, when the series of debentures was created.

An application under the Act of 1900 stands on a different footing from an application to extend the time for registration under s. 14 of the Bills of Sale Act, 1878, for the Act of 1900 throws the duty to register on the company, whereas the Act of 1878 throws that duty on the bill of sale holder. To allow the extension of time would not, under the circumstances, be unfair to the other debenture-holders.

[BUCKLEY J. Ought an order extending the time to be made after a winding-up has commenced? True there is no vesting of the company's property in the liquidator, but the rights of parties have crystallised.]

In *In re Spiral Globe, Limited* (1), Swinfen Eady J. did not consider that the fact that there was a winding-up was an objection to extending the time, although he inserted in the order words similar to those inserted in *In re Joplin Brewery Co.* (2)

Stewart-Smith, for the liquidators, was not called upon.

BUCKLEY J. On November 4, 1898, the directors of this company resolved that 5500*l.* should be raised by an issue of fifty-five debentures for 100*l.* each, and before January 1, 1901, they issued fifty of the debentures. In July, 1901, they issued the remaining five debentures to Davis. His solicitor considered the question whether it was necessary to comply with the provisions of the Companies Act, 1900, with reference to registration, and he says that on perusing the Act he came to the conclusion that in a case like the present, if anything required to be registered, it was only the resolution, and that as the resolution was passed in 1898, and therefore before the Act came into operation, nothing required registration. The debentures issued to Davis were, therefore, not registered.

The solicitor was wrong in the view which he took. The resolution did not create any mortgage or charge, but merely

(1) Ante, p. 396. (2) Ante, p. 79.

BUCKLEY J.
1902
S. ABRAHAMS & SONS, *In re.*

put the company in a position to raise a sum of money secured by a mortgage or charge. The charge was created, not in November, 1898, when the resolution was passed, but, so far as Davis is concerned, in July, 1901, after the Act of 1900 had come into operation. Sect. 14, sub-s. 1, of the Act provides that the mortgage or charge created by his debentures "shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless filed" within twenty-one days after the date of its creation. The five debentures issued to Davis were not registered, and are, therefore, void as a security against the liquidator and the creditors.

In October, 1901, the company passed an extraordinary resolution for voluntary winding-up, and in November the present summons for an extension of the time, under s. 15 of the Act, was issued.

The applicant desires that the order extending the time may be made without the insertion therein of the words which I inserted in the order made in *In re Joplin Brewery Co.* (1) What he wants is an order operating retrospectively to a date prior to the commencement of the winding-up. I cannot make such an order. At the commencement of the winding-up the company owed sums amounting to 5000*l.*, which were secured by debentures, and 500*l.* to the applicant, which was unsecured, and other sums to other unsecured creditors. Assuming that the assets are of the value stated to me, the company having gone into liquidation, the 5000*l.* secured by the first fifty debentures must first be paid in full, and the assets, if any, which remain after paying that sum and the costs will be applied in paying dividends to the unsecured creditors. If I made such an order as has been asked for, the holders of the debentures for 5000*l.*, whose security is now barely sufficient, would be prejudicially affected, and if any surplus remained the unsecured creditors would be prejudicially affected, for the effect of the order would be to give the applicant priority over them in respect of his debt of 500*l.*

What ground is there for making such an order? The

(1) Ante, p. 79.

language of s. 15 of the Companies Act, 1900, with reference to extending the time for registering debentures, is, it is true, wider than the language of s. 14 of the Bills of Sale Act, 1878, as to extending the time for registering bills of sale. The Act of 1878 says that the time may be extended where the omission to register is "accidental or due to inadvertence." The Act of 1900 says that the time may be extended where the omission is "accidental, or due to inadvertence, or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief." In the present case the omission to register was not "accidental"—it was deliberate. It was not "due to inadvertence." The Act of 1900 was considered by the applicant's solicitor, and he advised that it was unnecessary to register his client's debentures. The omission to register was, I think, however, due "to some other sufficient cause," namely, the solicitor's mistake. The registration was deliberately omitted because the applicant was advised by his solicitor that it was unnecessary. So far, therefore, the case is within s. 15 of the Act of 1900.

But, in my judgment, I ought not to make any order which will prejudice the position of the other creditors. There are two cases on s. 14 of the Bills of Sale Act, 1878, decided by the Court of Appeal, which I think in principle govern the present case: *Crew* v. *Cummings* (1) and *In re Parsons*. (2) The ground on which those cases were decided was that when for non-compliance with its provisions the Act has made a bill of sale void and the rights of a trustee in bankruptcy or an execution creditor have accrued, there is no reason why his rights should be taken away from him. Bowen L.J. in *Crew* v. *Cummings* (3) said: "I do not think that the Act of Parliament in giving the power to extend the time could have intended that such an extension of time should be granted after the title to the goods had actually vested in the execution creditor by reason of the failure of the holder of the bill of sale to comply with the provisions of the Act." In *In re Parsons* (2) the Court

(1) (1888) 21 Q. B. D. 420. (2) [1893] 2 Q. B. 122.
(3) 21 Q. B. D. 423.

BUCKLEY J. 1902 S. ABRAHAMS & SONS, *In re.*

held that its power to extend the time for registration ought not to be exercised so as to displace the title of a trustee in bankruptcy. When this company went into liquidation in October, 1901, the rights of its creditors attached, and the unsecured creditors had the right to say that the assets should be administered on the footing that only the holders of the debentures which did not require registration and the holders of any debentures which required registration and had been registered should have priority.

I cannot see that there is any principle on which I ought to take those rights away. Sect. 14 of the Act of 1900 says that if the debentures are not registered within a certain time they shall be "void against the liquidator and any creditor of the company." It has been contended that the order cannot affect the other unsecured creditors, because in any event there is nothing left for them. As to the other debenture-holders, it is said that they took under the same title as Davis, and that all the holders of debentures of that series were to rank pari passu. But the other debenture-holders have the right to say that the debentures which were to rank pari passu were those only which were validly issued, and those which were issued to Davis were invalid for want of registration. The other unsecured creditors might very well say that if they had known all the circumstances they would have tried to obtain payment of their debts long before the time when the company went into liquidation. I am unable to see why, because the applicant has been badly advised, he ought to be benefited at the expense of other wholly innocent persons.

Unless in very exceptional cases, I think that orders extending the time for registration ought to be qualified as in *In re Joplin Brewery Co.* (1) I am unable to see how, if a winding-up has commenced, an order containing the words inserted in the order made in that case can do anybody any good. If you have secured and unsecured creditors of a company in liquidation, you must, under an order in the form in *In re Joplin Brewery Co.* (1), first pay the secured creditors in full or to the

(1) Ante, p. 79.

extent of the assets. If there is a surplus after paying the secured creditors in full, the debenture-holder whose debenture has not been registered in time, and who obtains an extension of time on the terms imposed in *In re Joplin Brewery Co.* (1), cannot claim priority over but will come in pari passu with the unsecured creditors, and this position he would obtain without any order from the Court under s. 15 of the Act of 1900. Such an order as I made in *In re Joplin Brewery Co.* (1) would, in my judgment, be useless to the applicant. Under these circumstances his summons must be dismissed with costs.

Solicitors for applicant: *Close & Co.*
Solicitor for liquidators: *R. Barnes.*

F. E.

In re SOUTH WESTERN OF VENEZUELA (BARQUISIMETO) RAILWAY COMPANY.

[00139 of 1901.]

Company—Directors—Remuneration under Articles of Association—Appointment by Court of some of Directors as remunerated Receivers and Managers—Right to receive Remuneration in both Capacities.

The directors of a company were entitled under its articles of association to be paid at the rate of a certain sum a year to be divided amongst them as they should agree amongst themselves. In pursuance of their agreement the remuneration was paid to the directors in certain proportions. In a debenture-holders' action against the company two of the directors were appointed by the Court to be receivers and managers of the company's assets and business, and the Court allowed them a remuneration for so acting. Subsequently the company went into voluntary winding-up:—

Held, that the fact of the two directors being remunerated as receivers and managers did not disentitle them to their remuneration in addition as directors from the time when they were appointed receivers and managers until the commencement of the winding-up.

THE South Western of Venezuela (Barquisimeto) Railway Company, Limited, was incorporated in February, 1888.

Clause 90 of its articles of association provided that the "remuneration of the directors shall be at the rate of 1000*l.* a

(1) Ante, p. 79.

BUCKLEY J.
1902
SOUTH WESTERN OF VENEZUELA (BARQUISIMETO) RAILWAY, *In re.*

year," to be increased in a certain event, and that "such remuneration shall be divided among the board of directors in the manner which may be agreed amongst themselves, and in default of agreement equally by quarterly instalments."

By art. 102 it was provided that the office of a director should be vacated if he held "any salaried office or place under the company except that of managing director."

By a resolution of the board of directors passed on October 4, 1897, the remuneration was to be divided amongst the directors so that 300*l.* per annum should be paid to the chairman and 175*l.* to each of the other directors.

The remuneration of each director was paid by the company by a separate cheque each quarter, and the fees were all paid down to the end of the quarter between March 31, 1898, and June 30, 1898.

In 1899 an action was brought by A. Paton, on behalf of himself and the other debenture and debenture-stock holders of the company, against the company and the trustees of its debenture and debenture-stock trust deeds to enforce the debenture-holders' and stockholders' securities; and on September 20, 1899, an order was made in this action by the Vacation Judge appointing D. Cornfoot and H. Allen (who were two of the directors of the company) receivers, on behalf of the debenture-holders and debenture-stock holders, of the undertaking, railway, and real and personal property and assets of the company comprised in the securities, and to manage and work the railway, business, and undertaking of the company. The order required Cornfoot and Allen to give security for the performance of their duties as receivers.

On April 19, 1901, the company passed a resolution in favour of voluntary winding-up with a view to a reconstruction of the company.

In the winding-up Cornfoot, Allen, and two of the three other directors of the company took out a summons asking for an order that a claim for directors' fees down to March 31, 1901 (that is to say, a short time prior to the commencement of the liquidation) might be admitted by the liquidators.

The liquidators disputed so much of the claim as represented

the fees of the directors for the eighteen months from the end of September, 1899, to the end of March, 1901, when the work of the board of directors ended.

In the action the master fixed the remuneration of Cornfoot and Allen as receivers and managers at 2500*l.* for the whole period during which they acted.

There were several meetings of the board after the appointment of the receivers and managers.

The summons was heard by Buckley J. on February 18, 1902.

Danckwerts, K.C., and *Martelli*, for the applicants. Although the directors may have had little to do, they were always ready to act as directors. The directors were entitled to remuneration up to the time when the company went into voluntary liquidation, and none the less so because two of their number were for part of that time acting as receivers and managers appointed by the Court, and that those two persons were remunerated for so acting.

No question arises here about apportionment of the remuneration in respect of a fraction of a year, for art. 90 says that the remuneration is to be "at the rate of" so much a year.

Jenkins, K.C., and *Howard Wright*, for the liquidators. It must be admitted that the mere appointment of some of the directors as receivers and managers does not prevent the other directors from acting and earning their remuneration.

But if some of the directors are entitled to be remunerated under the articles and are appointed receivers, and as receivers obtain remuneration, they can only claim to be remunerated as directors on the footing that they account for the remuneration paid to them as receivers. The articles are evidence of the terms on which a director accepts his employment, and he is employed with the other directors to manage the business of the company. Their remuneration is given to them mainly for managing and controlling the business; but when receivers and managers are appointed, the business is managed by them and not by the directors.

In this case the company did not bargain with a director to

BUCKLEY J. 1902 SOUTH WESTERN OF VENEZUELA (BARQUISIMETO) RAILWAY, *In re.*

pay him for part of his work in managing its business, but for all he had to do; and if he is appointed receiver and manager and is paid for managing and working the business in that capacity, and is also paid the remuneration under the articles, he gets more from the company than has been bargained for under the articles. The argument only applies where the same man is acting at the same time in the two capacities of director and of receiver and manager.

[BUCKLEY J. Suppose that a colliery company is started to work and for a time works three collieries, and the remuneration payable to the directors under the articles is 1000*l.* a year, and that then it demises, under a power in its memorandum of association, two of or even all the collieries, would not the directors still be entitled to 1000*l.* a year, although they have less or nothing to do by way of management, but have only to receive royalties? Does the fact that the actual business operations of working the collieries are no longer carried on by the board affect their remuneration?]

No. But here the receivers and managers are substantially working the business, being remunerated for so doing. If they at the same time draw their remuneration as directors, they are being paid twice for managing the business.

Danckwerts, K.C., in reply.

BUCKLEY J. This is a claim, by four out of the five directors of the company, for remuneration from the end of June, 1898, to the end of March, 1901. As regards the remuneration up to the end of September, 1899, there is no dispute. The portion of the claim which is disputed is that which is for remuneration from September, 1899, to March, 1901—a year and a half. The total amount of remuneration payable to all the directors under art. 90 is 1500*l.*; but, having regard to the way in which the directors divided the remuneration among themselves and to the fact that one of them is not a claimant, the amount in dispute is 1237*l.* 10*s.* only. [His Lordship referred to the order of September 20, 1899, and the resolution for winding up, and continued:—]

The period in respect of which the claim for remuneration is

disputed is practically from the date when the receivers and managers were appointed down to the commencement of the winding-up. On March 12, 1901, Master Villiers fixed the remuneration of the receivers and managers at 2500*l.* for the period from the date of their appointment down to May 31, 1901. I have spoken to him about this matter, and he has told me that the remuneration was fixed without any bargain that the directors should give up their claim to remuneration under the articles. I have, therefore, only to decide whether the directors are entitled to remuneration under the articles of association from the time when two of their number were appointed receivers and managers until the company went into liquidation.

Under clause 90 of the articles of association the directors have a right to be paid at the rate of 1000*l.* a year, which sum was always divided in such a way as to give the chairman 300*l.* and each of the other directors 175*l.* That was a subsisting contractual obligation down to the time when the company went into liquidation. But on behalf of the liquidators it is said that by the articles of association the duty of managing the business of the company was thrown upon the directors, that after the order of September 20, 1899, the persons thereby appointed receivers and managers managed that business, that those persons were paid 2500*l.* for their management for the period which I have mentioned, that the company has to pay both the remuneration of the directors and the remuneration of the receivers and managers, and, therefore, that in some way, as between the directors who were receivers and managers and the company, credit ought to be given for the 2500*l.*

That contention cannot prevail. The directors are entitled to their 1000*l.* a year as the payment to be made to them for doing that which for the time being they have to do as directors of the company. If, by reason of the appointment of receivers and managers, the directors have less to do, that, in my judgment, does not in any way diminish the amount which they are to be paid as remuneration under the articles. Their obligation as directors is to do whatever there is to be done by

BUCKLEY J.

1902

SOUTH WESTERN OF VENEZUELA (BARQUISIMETO) RAILWAY, *In re.*

them as directors. The remuneration paid to two of them as receivers and managers was a payment made to them for doing what they had to do as receivers and managers, and if in the latter character they did something which made their work lighter in the former character, that did not in any way diminish the amount which they were entitled to receive for acting in the former character.

The result, therefore, is that Cornfoot and Allen are entitled to the remuneration given to them as receivers and managers, and also to their shares in the remuneration given to the directors by the articles of association.

No question arises as to the right of the other two claimants to remuneration. They were not appointed receivers and managers, and are entitled to their fees as directors.

Four separate proofs for the amounts payable to the four claimants must be put in, and the claimants can add their costs to the amounts of their proofs.

Solicitors for applicants: *Maddisons.*

Solicitors for liquidators: *Stephenson, Harwood & Co.*

F. E.

In re METAL CONSTITUENTS, LIMITED.

LORD LURGAN'S CASE.

[00364 of 1901.]

BUCKLEY J.

1902

Feb. 18, 19.

Company—Shares—Memorandum of Association—Subscription obtained by Misrepresentation—Winding-up — Contributory — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18, 23.

L. signed the memorandum of association of a company before its incorporation for 250 shares. After its incorporation he sought to escape from liability on the shares on the ground that he was induced to sign the memorandum by the misrepresentation of a promoter of the company:—

Held, that, assuming the misrepresentation was made and acted on, L. was nevertheless liable on the shares, (*a*) because the company before it came into existence could not appoint an agent, and was therefore not liable for the acts of the promoter; (*b*) that by signing the memorandum L. on the registration of the company became bound, not only as between himself and the company, but also as between himself and the other persons who should become members.

Karberg's Case, [1892] 3 Ch. 1, distinguished.

THE Metal Constituents, Limited, was registered under the Companies Acts, 1862 to 1900, on May 10, 1901, with a capital of 10,000*l.*, in 9980 ordinary and 20 management shares of 1*l.* each.

The memorandum of association was signed by Lord Lurgan for 250 ordinary shares.

In August, 1901, the secretary of the company applied to Lord Lurgan for payment of the amount of the shares, and the latter replied on August 15 that he "was induced to apply for shares as a signatory upon misrepresentations made to him." He denied that he was a shareholder in the company, and refused to make the payment asked for.

On August 17 Lord Lurgan took out an originating summons for rectification of the register of members of the company by removing his name therefrom in respect of the 250 shares, but nothing was done on the summons before the winding-up.

On October 23, 1901, the company passed an extraordinary resolution for voluntary winding-up and appointing a liquidator.

BUCKLEY J.
1902
LORD LURGAN'S CASE.

The liquidator in November settled Lord Lurgan's name on the list of contributories, and Lord Lurgan took out a summons to vary the list by excluding his name therefrom. In support of the summons he filed an affidavit stating that he had been induced to sign the memorandum and articles of association of the company by misrepresentations made to him by a man named Sims, who was a promoter of the company. The judge found as a fact that Lord Lurgan preferred to remain as a shareholder after Sims had told him that he, Sims, could sell the shares at 1*l.* per share profit at once.

A. Houston, in support of the summons. A shareholder is entitled to have his name removed from the register of members when he has been induced to apply for them by the misrepresentation of a promoter of the company, although the representation was made before the incorporation of the company: *Karberg's Case* (1); *In re Canadian Direct Meat Co., Tamplin's Case.* (2) [He also referred to *Alexander* v. *Automatic Telephone Co.* (3)]

Eve, K.C., and *Manning*, for the liquidators. Assuming the promoter induced Lord Lurgan to sign the memorandum by making a misrepresentation to him, that was done before the company came into existence, and it was incapable then of appointing an agent, and is therefore not responsible for the promoter's doings. Moreover, persons who sign the memorandum of association of a company are in a different position from other persons who agree to become members. The subscription of the memorandum is the initial act in creating the body corporate, and on registration the subscriber becomes a member: *Nicol's Case.* (4)

Houston, in reply.

BUCKLEY J. I will assume that before the incorporation of the company Sims made to Lord Lurgan a representation which was untrue, and on the faith of which Lord Lurgan signed the memorandum of association of the company for

(1) [1892] 3 Ch. 1.
(2) W. N. (1892) 94, 146.
(3) [1900] 2 Ch. 56.
(4) (1885) 29 Ch. D. 421, 444.

250 shares. Is Lord Lurgan entitled to rescission of his contract to take shares on the ground of the assumed misrepresentation? I think not. Before the incorporation of the company Sims was not the agent of the company, because the company did not exist, and therefore Lord Lurgan could not have been induced to sign for the shares by the misrepresentation of the company or its agent. The contract of the subscriber of a memorandum of association is of a very peculiar kind. Down to the moment when the memorandum and articles are taken to Somerset House to be registered there is no contract at all, because the corporation does not exist, and any contract by the signatories must be with the corporation. At the moment of registration two things take place by force of the Companies Act, 1862—the company springs into existence, and the subscribers to the memorandum of association become, by virtue of s. 23 of that Act, members of the company There is no executory contract which is subsequently executed. There is no contract at all until the moment when the corporation and the character of membership in the signatories to the memorandum come simultaneously into existence. I must, therefore, hold that the subscriber to the memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentations of an agent of the company.

The second point taken on behalf of the applicant is that he is entitled to rescission on the principle that if one party to a contract has obtained a benefit under the contract from the other party to it, and that other party was misled into entering into the contract, then although the first party took no part in misleading him, the first party cannot insist on the performance of the contract. Can Lord Lurgan insist on this principle in his favour? I think not. The scheme of the Companies Act, 1862, is that the company owes its existence under s. 6 to the signatures of seven persons to the memorandum of association; and s. 23 says that the subscribers of the memorandum "shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the

BUCKLEY J.

1902

LORD LURGAN'S CASE.

register of members hereinafter mentioned; and every other person who has agreed to become a member . . . . and whose name is entered on the register of members, shall be deemed to be a member of the company." The contract effected by signature of the memorandum and registration of the company is not merely a contract created between the subscriber and the company. It is a contract whose existence is the basis of the creation of the corporation as one of the contracting parties, and every other person who becomes a member becomes such on the footing that that contract exists. Sect. 18 provides that upon the registration of the memorandum and articles the registrar is to give his certificate, and that "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate." So that when this corporation came into existence the effect of the Act was that it existed with Lord Lurgan and others as members of it. If he could rely on *Karberg's Case* (1), and be relieved from his contract on the ground that the company cannot retain the benefit of a contract entered into on the basis that the representation made by Sims was true, then every person who subsequently became a member on the footing that the corporation existed with Lord Lurgan as a member would be deprived of the benefit which he supposed he had by Lord Lurgan being a member. In *Karberg's Case* (1) the acceptance of the application for shares by the allotment of the shares was the acceptance of the offer on the terms of the prospectus, although that prospectus was issued by the promoters. In the present case no allotment of the shares to Lord Lurgan was necessary. His signature to the memorandum of association made him on registration a member of the company, and bound him not only in favour of the company, but in favour of every other person who became a member of the company. Therefore on the law the applicant must fail.

But on the facts also I think he fails. [His Lordship reviewed the facts in detail, and found that Lord Lurgan had

(1) [1892] 3 Ch. 1.

elected to keep the shares after he had become suspicious about the company, and after Sims had told him that he could sell the shares at a profit.] The application must be dismissed with costs.

Solicitor for applicant: *H. Percy Becher.*
Solicitors for liquidator: *Blair & Girling.*

F. E.

In re PARTINGTON. REIGH *v.* KANE.

[1899 P. 2857.]

Settled Land—Capital Money—Improvements—Income or Capital chargeable—Leaseholds held on Trust to pay Rents and perform Lessees' Covenants and subject thereto for Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 15.

Properties, the leases of which contained covenants by the lessees to do works which would be repairs and improvements within the meaning of the Settled Land Acts, were bequeathed to trustees upon trust out of the rents and profits to pay the rents reserved by the leases and perform the lessees' covenants, and subject thereto upon trusts under which K. was tenant for life, with remainders to other persons.

Without any scheme being submitted under s. 26 of the Settled Land Act, 1882, money was expended in making improvements:—

Held, that as there was a trust, providing for improvements out of income, and that trust came before the trust for K., the expenses must be borne by income.

Clarke v. *Thornton*, (1887) 35 Ch. D. 307, and *In re Lord Stamford's Settled Estates*, (1889) 43 Ch. D. 84, distinguished.

Held, further, following *Countess of Cardigan* v. *Curzon-Howe*, (1893) 9 Times L. R. 244, that even if the Court had power to direct payment for the improvements out of capital, as no scheme had been submitted the power could only be exercised under s. 15 of the Settled Land Act, 1890, and that under that section there was a discretion which ought not to be exercised in favour of K.

CHARLES JAMES PARTINGTON died on August 19, 1889, possessed of leasehold houses held for the unexpired residues of long terms, the residues being 48½ years, 56 years, and 67¼ years, and one of 18¼ years.

By his will, dated April 4, 1888, the testator devised and

BUCKLEY J. 1902 PARTINGTON, *In re.* REIGH *v.* KANE.

bequeathed all his leasehold messuages and hereditaments unto Loftus Henry Plunkett and James Boydell, their executors, administrators, and assigns, for all such estate, term, or interest as the testator should have therein respectively at his death, upon trust that Plunkett and Boydell, and the survivor of them and the executors or administrators of such survivor, should "by and out of the rents and profits thereof pay the rents and annual sums reserved by the leases thereof respectively, and perform and observe the lessees' covenants and conditions in the said leases respectively contained, and subject thereto" should hold the same premises upon trusts corresponding with the uses declared with reference to the testator's real estate, which was given to the use of Maud Legh Kane and her assigns without impeachment of waste, and after her death to the use of her first and other sons successively in tail, and on failure of such issue to the use of her daughters in common with cross remainders in tail, and on the failure of such issue to the use of L. H. Plunkett for life, with remainder to the use of his first and other sons successively in tail, and on failure of such issue to uses in favour of his daughters.

The will was proved by Plunkett but not by Boydell, who disclaimed the trusteeship.

Plunkett's will was proved in England in 1894 by P. Reigh, his executor.

The sanitary authorities of the district in which the leaseholds lay served notices requiring repairs or improvement of drainage. The works were done and a sum of 415*l.* 10*s.* 1*d.* was expended upon them, but no scheme for the execution of the works was submitted under s. 26 of the Settled Land Act, 1882.

It was admitted by the tenant for life that the lease in the case of each house contained a covenant which would oblige the lessee to do all the works which had been done, and the cost of which amounted to 415*l.* 10*s.* 1*d.*

There was some dispute as to who were the persons who would be entitled to the property after the death of Maud L. Kane, and by an originating summons, in which as amended Reigh and two other persons (trustees for the purposes of the Settled Land Acts, 1882 to 1890) were plaintiffs, and Maud

L. Kane, the only two daughters of Plunkett, who claimed to be entitled after the death of Maud L. Kane, and G. Fraser, otherwise G. Kane, on whose behalf it was claimed that he was entitled on her death, were defendants. The summons asked that it might be determined whether the plaintiffs ought to pay the 415*l.* 10*s.* 1*d.* out of capital, or whether the same or any part thereof ought to be paid out of income, and also whether Guy Fraser was entitled to any, and if so what, interest under the will, or that directions might be given for the determination of this question.

The summons was heard on February 24, 1902, by Buckley J., who held, in the first place, that there was no jurisdiction on the summons to decide whether Fraser or the daughters of Plunkett were entitled on the death of Maud L. Kane. It was admitted, however, that either those daughters or Fraser would then be entitled, and the argument of the case accordingly proceeded.

Harry Greenwood, for the plaintiffs, stated the facts of the case and the questions arising for decision.

H. S. Preston, for M. L. Kane. The tenant for life is entitled to have so much of the expense as was incurred in making improvements thrown upon capital. This contention is supported by *Clarke* v. *Thornton*. (1) Under s. 15 of the Settled Land Act, 1890, the Court may sanction the application of capital moneys in repaying to the tenant for life money expended by him on improvements without the submission of a scheme: *In re Tucker's Settled Estates*. (2) The cost of reconstructing the drainage of leasehold houses forming part of residuary estate held in trust for one person for life and after her death for other persons was held to be payable out of capital, although, prior to the sale of the property, there was a direction that the rents and profits should, "after payment thereout of all incidental expenses and outgoings," be paid to the tenant for life: *In re Thomas*. (3) [He also referred to *In re Richardson*. (4)]

(1) 35 Ch. D. 307.
(2) [1895] 2 Ch. 468.
(3) [1900] 1 Ch. 319.
(4) [1900] 2 Ch. 778.

BUCKLEY J. 1902 PARTINGTON, *In re.* REIGH *v.* KANE.

A. Underhill, for the daughters of Plunkett. In the first place it is submitted that there is no jurisdiction to direct the payment of the improvements out of capital. The cases cited on behalf of the tenant for life do not apply, for the whole trust in her favour of the income is subject to payment thereout of what has to be expended in performing the lessees' covenants, which involves the making of improvements. Moreover, if the Court is asked to act under s. 26 of the Settled Land Act, 1882, there is the objection that no scheme was submitted to the Court under that section before the expenses were incurred: see Hood and Challis on the Conveyancing and Settled Land Acts, 6th ed. p. 255.

If the Court is asked to act under s. 15 of the Settled Land Act, 1890, which empowers the Court to authorize capital money to be applied in payment for improvements although no scheme has been submitted, the Court has a discretion, which it may decline to exercise where the settlor has pointed out the fund which is to bear the expense: *Countess of Cardigan* v. *Curzon-Howe*. (1) If there is a discretion, this is not a case in which it should be exercised in favour of the tenant for life. In *In re Tucker's Settled Estates* (2) there was a reconstruction of the drainage system. [He also referred to *In re Betty*. (3)]

F. Baden Fuller, for Fraser. The whole cost ought to be thrown on the tenant for life and not on the remainderman. [He referred to *In re Copland's Settlement*. (4)]

Cur. adv. vult.

March 3. BUCKLEY J. (after stating the facts). The question I have to determine is whether this sum ought to be paid out of capital of the settled property, or whether the same or any part thereof ought to be paid out of income. For the purposes of this decision it may be assumed that some part of the work is not mere repair, but would be an "improvement" within the Settled Land Acts.

(1) 9 Times L. R. 244.
(2) [1895] 2 Ch. 468.
(3) [1899] 1 Ch. 821.
(4) [1900] 1 Ch. 326.

Under the disposition in the testator's will the tenant for life is not entitled to the rents of these premises. The trusts are, out of the rents and profits, to pay the rents reserved by, and perform the covenants contained in, the leases, and it is only "subject thereto" that the defendant is entitled as tenant for life. In other words, she is tenant for life, not of the rents of these leaseholds, but of the balance of such rents after first paying, amongst other things, this sum of 415*l.* 10*s.* 1*d.* It has, however, been argued before me, on her behalf, that the provisions of the Settled Land Acts override the trusts of the will, and that I ought to deal with the matter as if she were not tenant for life of this balance, but were tenant for life entitled to have the provisions of the Settled Land Acts so applied as to throw the expense of so much as falls within "improvements" upon capital, and thus increase the balance to come to her under the trusts as income. For this proposition the authority relied upon is the decision of Chitty J. in *Clarke* v. *Thornton*. (1) I do not think that authority supports the contention. The facts there were that the trustees were to enter into possession or receipt of the rents, and to manage the estate, with powers of management sufficient to include the making of improvements, and a trust out of the rents to pay the expenses incurred in management or in exercise of any of their powers. An outlay of 4398*l.* was required for repairs and improvements. The trustees had not done, or determined to do, the works under their power. There were two applications before the Court—the one by the tenant for life in remainder to have these works done at the expense of income, and the other by the tenant for life in possession to have them, or such of them as were not ordinary repairs, done at the expense of certain accumulated rents which were capital. The applications were made in an action which had been instituted for the administration of the trusts of the will. Under these circumstances there were two powers available—that is to say, first, the Court might direct the trustees to proceed under their power in the will, in which case there would have been a trust to pay the expenses out of income, or, secondly, the Court

(1) 35 Ch. D. 307.

BUCKLEY J. 1902 PARTINGTON, *In re.* REIGH *v.* KANE.

might not direct the trustees to proceed under that power, but might, under the Settled Land Acts, provide for such as were improvements at the expense of capital. The Court took the latter course. There was not in *Clarke* v. *Thornton* (1), as there is here, a trust coming before the trust for the tenant for life and providing for payment of improvements out of income. There would have been such a trust if the trustees had proceeded, or the Court had directed them to proceed, in exercise of their power—an event which did not happen. That decision was followed by Stirling J. in *In re Lord Stamford's Settled Estates* (2), and, again, in that case there was no trust for payment of improvements out of income before arriving at the amount payable to the tenant for life. The learned judge, at p. 96 of the report, says that in *Clarke* v. *Thornton* (1) "the will had thrown the improvements on the income." By this he meant, I think, that if they were provided for, not under the Settled Land Acts, but by the exercise of the power in the will, they were thrown upon income—not that they were thrown by the will upon income in any event. I think, therefore, that income and not capital ought to bear the 415*l.* 10*s.* 1*d.*

There is another ground upon which I think this case ought again to be decided in the same way. These repairs and improvements cannot be provided for out of capital under the Settled Land Act, 1882, because they have been executed without first carrying in a scheme for their execution. The application must be made under s. 15 of the Settled Land Act, 1890. Under that section there is a discretion in the Court: *Countess of Cardigan* v. *Curzon-Howe*. (3) How ought I to exercise this discretion when the testator has expressly provided that these expenses shall be borne by income? It seems to me that I ought to throw them where the testator throws them, and direct the trustees to pay these expenses out of income, inasmuch as the works fall within the obligation to perform and observe the lessees' covenants in the leases. It is said that the tenant for life is restrained from anticipation. I

(1) 35 Ch. D. 307. (2) 43 Ch. D. 84.
(3) 9 Times L. R. 244.

do not see that any difficulty arises from this fact. There will be no further income coming to her under the trust in the will until there shall have been discharged this amount, the payment of which under the trust has priority over the payment to her. I therefore hold that the 415*l.* 10*s.* 1*d.* is to be borne by income.

Solicitors for applicants: *Mott & Son.*

Solicitors for M. L. Kane and G. Fraser: *Stow, Preston & Lyttelton.*

Solicitors for daughters of Plunkett: *Bannister, Williams & Ram.*

F. E.

In re SETON-SMITH. BURNAND *v.* WAITE.

[1901 S. 3803.]

Will—Construction—Gift of "Furniture and other Personal Effects"—Effect as regards Fixtures and Trade Furniture.

Testator was an innkeeper carrying on business at, and the yearly tenant of, the Roebuck Hotel, where there were furniture and effects, some part of which was used by him personally and the rest for the purposes of the hotel business; also trade and tenant's fixtures.

By his will he bequeathed "all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel," to W., and he gave the residue of his personal estate to other persons:—

Held, that W. was entitled to the furniture, linen, plate, glass, china, and other effects at the hotel, whether used for domestic purposes or for the purposes of the hotel business; but not to the trade or tenant's fixtures.

H. SETON-SMITH by his will, dated May 10, 1901, in which he was described as "at present staying at the Roebuck Hotel, Tilehurst," after appointing executors and trustees, and bequeathing his live stock, and a trinket to be selected by the legatee to two different persons, proceeded as follows: "I bequeath all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck

BUCKLEY J.

1902

SETON-SMITH, *In re.* BURNAND *v.* WAITE.

Hotel aforesaid, to Gertrude Alexandra Waite, who is now residing at the said hotel." The will contained no further special reference to the hotel (except as the residence of a pecuniary legatee), but the testator by his will gave the residue of his personal estate upon certain trusts, after paying his funeral and testamentary expenses and debts and pecuniary legacies, in favour of Joan Chard and Ethel Chard.

The testator died on May 11, and his will was proved on June 11, 1901.

The trustees and executors took out an originating summons, to which Gertrude A. Waite, Joan Chard, and Ethel Chard were made defendants, for the determination of, amongst others, the questions whether, according to the true construction of the will, any and which of the effects of the testator at the Roebuck Hotel at the date of his death, forming part of (*a*) his trade or tenant's fixtures and trade implements, (*b*) his furniture and personal effects not connected with the trade or business carried on by him at the hotel, and (*c*) his linen, plate, glass, china, and other effects used by him in connection with his said trade or business, passed under the gift to Gertrude A. Waite, or under the gift of residuary personalty.

The evidence shewed that at the time of his death the testator had no lease of the hotel, but was only tenant thereof, and that he carried on business there as a licensed victualler; that in the hotel were furniture and effects used independently of the business of the hotel, trade or tenant's fixtures, and trade implements, linen, plate, glass, china, and other effects used in connection with the hotel business; that Gertrude A. Waite acted as manageress of the hotel without salary, but on the terms of receiving a share of the profits; and that the testator had no separate private residence.

George Lawrence, for the trustees and executors, stated the facts, and the questions raised by the summons.

W. M. Cann, for G. A. Waite. All the furniture in the hotel passed by the gift whether it was used exclusively for the testator's domestic or personal use or not. The term "personal effects" means personal estate. The term generally used in

wills is "household furniture," but "furniture" is a larger term.

A bequest of "household furniture and other household effects" in a dwelling-house comprises all property kept there either for use or ornament: *Cole* v. *Fitzgerald.* (1) Where a testator gave all his estate at a certain place where he resided, "also all furniture and other movable goods" there, the gift was held to include live stock and implements of husbandry in or about the adjoining lands and money in the house: *Swinfen* v. *Swinfen* (*No.* 4). (2)

The tenant's and trade fixtures could have been removed by the testator at any time, and they also passed to G. A. Waite.

Christopher James, for the residuary legatees. The residuary legatees claim the fixtures, furniture, and effects, except the furniture and effects which were unconnected with the trade.

Tenant's fixtures in a leasehold house occupied by the testator do not pass under a gift of "household furniture": *Finney* v. *Grice.* (3)

The term "personal effects" must be read as only including things ejusdem generis with furniture, and would cover what was held to pass under the gift in *Cole* v. *Fitzgerald* (1), but not things connected with the trade. If a cabinet-maker bequeathed all the furniture in his house, and he carried on business at the same place, the furniture offered for sale would not pass.

In *Swinfen* v. *Swinfen* (2) there was no residuary gift. That case was considered in *Northey* v. *Paxton* (4), where effect was given to the ejusdem generis doctrine by excluding jewellery from a gift of "all the household furniture and effects" in and about the residence of the testatrix.

In *Pratt* v. *Jackson* (5) the House of Lords held that beds and other furniture in a seamen's home were not household furniture.

(1) (1823) 1 S. & S. 189; affirmed on appeal (1827) 3 Russ. 301; 27 R. R. 80.

(2) (1860) 29 Beav. 207.

(3) (1878) 10 Ch. D. 13.

(4) (1889) 60 L. T. 30.

(5) (1725) 2 P. Wms. 302; reversed on appeal (1726) 1 Bro. P. C. 222.

BUCKLEY J.
1902
SETON-SMITH, *In re.* BURNAND *v.* WAITE.

Manning v. *Purcell* (1) and *Le Farrant* v. *Spencer* (2) are authorities shewing that "household furniture" does not include things even in the building where the testator resided which are used for trade or merchandise, as distinguished from domestic use.

BUCKLEY J. The question I have to decide is, What is the meaning of "all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel"? The testator carried on the business of an innkeeper at the hotel, which he held upon a yearly tenancy. Miss Waite, the legatee, was the manageress of the hotel and lived there. She brought some furniture with her when she came to live there. She had no regular salary, but was entitled to a share of the profits of the business.

The legatee says in the first place that, under a gift of the things I have mentioned, she is entitled to the fixtures in the hotel. I think not. It is true that the fixtures belonged to the testator, but it is most improbable that he intended to give Miss Waite the right to take down such things as roller-blinds and gas-fittings. Suppose the testator had been the owner of the house, and had given the house to A. and the furniture and other personal effects in it to B., A. would clearly have been entitled to the fixtures. I do not think that it makes any difference that the testator in this case held the house on only a short tenancy. In *Finney* v. *Grice* (3) Sir George Jessel put the case which I have put. There the gift was to the testator's wife of all his "household furniture, plate, linen, and china articles and things" with certain exceptions "that may be within my dwelling-house at the time of my decease," and the Master of the Rolls said: "I dissent most emphatically from the proposition that where the owner of a leasehold house containing tenant's fixtures bequeaths the house to A. and the 'furniture' to B., that entitles B. to remove the mantel-pieces, stoves, kitchen dressers and shelves, and articles of that kind." He held that the words of the gift did not pass the tenant's

(1) (1855) 7 D. M. & G. 55. (2) (1748) 1 Ves. Sen. 97.
(3) 10 Ch. D. 13, 14.

fixtures in a leasehold house occupied by the testator. I hold that in the present case neither the trade fixtures nor the tenant's fixtures passed to Miss Waite.

As regards the furniture, some was used by the testator, some by Miss Waite, and some by the visitors staying at the hotel. There was also a quantity of plate, linen, and other effects used indiscriminately. The residuary legatees say that the only things that passed to Miss Waite were those which belonged to the testator in the sense that he used them personally and not merely for the purposes of the business. That is not the view which I take. The things which I have mentioned passed to her whether they were used for business purposes or not.

Certain decisions relied on by counsel for the residuary legatees are distinguishable. In *Pratt* v. *Jackson* (1) the question to be decided arose under the following circumstances. Jackson lived in London, and he also had near Gosport a seamen's home where there were a number of beds and other furniture. There was a settlement under which his wife was entitled to "all or any the household goods or utensils or household stuff, rings, plate, jewels or linen" of her husband at his death. The point for decision was whether on her husband's death she was entitled to the beds and furniture in the house near Gosport. As reported in 1 Brown's Parliamentary Cases, p. 222, it was ultimately held that she was not entitled to the beds and furniture in the seamen's home. The household the goods of which she was to take was the household of her husband, and the home near Gosport was not for this purpose his household.

In *Le Farrant* v. *Spencer* (2) the gift was of all the testator's "household furniture, linen, plate, and apparel whatsoever," and those words were held not to include goods which the testator had, not for his own domestic use, but for trade or merchandise. In *Manning* v. *Purcell* (3) the bequest was of "all my moneys, household furniture, plate, books, linen, wearing apparel, &c., &c.," and it was held that such parts

(1) 2 P. Wms. 302; reversed on appeal 1 Bro. P. C. 222.

(2) 1 Ves. Sen. 97.

(3) 7 D. M. & G. 55.

BUCKLEY J.
1902
SETON-SMITH, & *In re.* BURNAND *v.* WAITE.

only of the furniture of a tavern, where he carried on business and occasionally slept, as were for his own domestic or personal use, passed by the gift. The ground of the decision was, I think, that "my household furniture" did not include such goods in the tavern as belonged merely to the business there carried on, and were designed for the purposes of that business. In my judgment those cases do not apply to the present case. The gift here is not of "my household furniture," but of "the furniture . . . . belonging to me . . . . at the Roebuck." I hold that all the furniture, linen, plate, china, glass, and other effects belonging to the testator, and which at the date of his death were at the Roebuck Hotel, whether they were used in the business or not, passed under the bequest to Miss Waite, but that neither the trade nor the tenant's fixtures passed under that bequest.

There must be an inquiry as to what were trade or tenant's fixtures.

Solicitors for trustees and residuary legatees: *Morris & Bristow.*

Solicitors for G. A. Waite: *Gribble & Co., for C. E. Hewett, Reading.*

F. E.

In re BENJAMIN.
NEVILLE *v.* BENJAMIN.

JOYCE J.
1902
Feb. 1.

[1900 B. 5435.]

Will — Legatee entitled to Share on surviving Testator — Disappearance in Testator's Lifetime—No Evidence of Death—Presumption—Onus Probandi.

In September, 1892, P., who was then twenty-four years of age, disappeared, and he had never since been heard of. Under his father's will he was entitled to a share of the residuary estate in the event of his surviving the testator. The testator died in June, 1893. Upon a summons taken out by the trustees in 1900 to have it determined how P.'s share ought to be dealt with:—

Held, that P. must be presumed to be dead, and, in the absence of proof that he had survived the testator, the Court, without making any declaration as to the date of P.'s death, gave the trustees liberty to distribute his share on the footing that he had predeceased the testator.

DAVID BENJAMIN, by his will dated in 1891, gave his residuary estate to trustees upon trust for sale and conversion, and to divide the proceeds into as many shares as he should have children who should be living at his death, or should have died in his lifetime leaving children living at his death, and to appropriate one share to each such child of the testator.

The testator died on June 25, 1893. He had thirteen children, twelve of whom were living at his death, but as to one of them, Philip David Benjamin, it was not known whether he had predeceased the testator or not, he having on September 1, 1892, disappeared under the following circumstances. At that time he was twenty-four years of age, and was employed as a traveller in the service of Messrs. Blanckensee & Son, Limited, of Birmingham. Some of the members of the firm were nearly related to him. In August, 1892, he went abroad for a holiday. On September 1, 1892, he was at Aix-la-Chapelle with a friend. On that day he received a communication from his firm requiring his attendance in London. Upon receipt of this he at once left his friend, promising to return in a few days, and started by train apparently for London. Since that day nothing had been heard of him, although searching inquiries had been made and

JOYCE J. 1902 BENJAMIN, *In re.* NEVILLE *v.* BENJAMIN.

advertisements published in all the English Colonies and in other parts of the world. It appeared that an examination of his accounts shewed that he was in default to his employers, but their communication to him had contained no threat or suggestion of prosecution, and the amount of his defalcation was at once made good to the firm by the testator.

By a codicil dated September 29, 1892, the testator altered the provision which he had made for him by his will. The share to which P. D. Benjamin was entitled if he survived the testator amounted to about 30,000*l.*

Letters of administration to his estate had been granted to one of his brothers, leave having been obtained from the Probate Division to swear his death on or since September 1, 1892. In 1900 the trustees of the testator's will took out an originating summons to have it determined in what manner the share of P. D. Benjamin in the estate of his father ought to be dealt with or disposed of by them.

In answer to an inquiry directed by the Court on March 14, 1901, the master had stated that he was unable to certify whether P. D. Benjamin was living or dead, or if dead, when he died. He certified, however, that P. D. Benjamin was not married at the time of his disappearance, and that no person claiming to be his wife or child had come in under the advertisements which had been issued, or made any application to the trustees or their solicitors. The trustees now asked for an order upon the summons giving them liberty to distribute the estate as if P. D. Benjamin had predeceased the testator.

Hughes, K.C., and *E. Ford*, for the trustees. P. D. Benjamin must now be presumed to be dead, and the burden of proof is upon those claiming under him to shew that he was living at the testator's death, and so entitled to take under the will: *In re Walker.* (1)

A. H. Jessel, for the administrator of P. D. Benjamin. There is no presumption that P. D. Benjamin predeceased the testator. The rule of the Court is to presume life unless there is good reason to suppose the contrary. Disappearance

(1) (1871) L. R. 7 Ch. 120.

unaccounted for is necessary to rebut the presumption of life: Taylor on Evidence, 9th ed. p. 171. When there is good motive for disappearance, the presumption of death does not arise. The principle on which the Court presumes death in such cases is, that if the person were living he would probably have communicated with his friends or relatives. When no such probability exists, the presumption cannot arise: *Bowden* v. *Henderson.* (1) In *Watson* v. *England* (2) it was held that death ought not to be presumed merely from the fact of a person not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive. Shadwell V.-C. there said that the old law relating to the presumption of death was daily becoming more and more untenable. For, owing to the facility which travelling by steam afforded, a person might then (1844) be transported in a very short space of time from this country to the backwoods of America, or to some other region, where he might never be heard of again. The observations of the Vice-Chancellor would probably have been stronger had he been deciding that case at the present time.

In this case there is abundant reason for the disappearance of P. D. Benjamin, and for his not communicating with his relatives; and the Court will not presume that he died at any fixed time. On the contrary, it ought to be presumed that he was alive at the death of the testator: *Corbishley's Trusts.* (3) See also *In re Phené's Trusts* (4); *In re Lewes' Trusts* (5); *In re Rhodes* (6); *Hickman* v. *Upsall.* (7) In *In re Walker* (8) there was every ground for supposing that if the person in question there had been alive he would have communicated with his friends. It is not so here.

JOYCE J. I think in this case that Philip David Benjamin must be presumed to be dead. There is no reason why he should hesitate to come home now, although there might have

(1) (1854) 2 Sm. & Giff. 360, 366.
(2) (1844) 14 Sim. 28.
(3) (1880) 14 Ch. D. 846.
(4) (1870) L. R. 5 Ch. 139.
(5) (1871) L. R. 6 Ch. 356.
(6) (1887) 36 Ch. D. 586.
(7) (1875) L. R. 20 Eq. 136.
(8) L. R. 7 Ch. 120.

JOYCE J. 1902 BENJAMIN, *In re.* NEVILLE *v.* BENJAMIN.

been at first. The question is as to when he died. If he is to be presumed to be dead, I think the case of *In re Walker* (1) distinctly applies, and the onus of proof is on his administrator. He has failed to adduce any evidence to shew that P. D. Benjamin survived the testator. I myself consider it highly probable that he died on September 1, 1892, or at all events shortly after. I am clearly of opinion that the onus is on those claiming under him to prove that he survived the testator. In my opinion, therefore, the trustees are at liberty to distribute. I am anxious, however, not to do anything which would prevent his representative from making any claim if evidence of his death at any other time should be subsequently forthcoming. I shall not, therefore, declare that he is dead, but I will make an order in the following form :—

In the absence of any evidence that the said P. D. Benjamin survived the testator, let the trustees of the testator's will be at liberty to divide the share of the testator's estate devised and bequeathed in favour of the said P. D. Benjamin, his wife and children, upon the footing that P. D. Benjamin was unmarried and did not survive the testator.

Solicitors : *Emanuel & Simmonds.*

(1) L. R. 7 Ch. 120.

G. A. S.

Followed. COOK *v.* SHOESMITH [1951] 1 K. B. 752

GROVE *v.* PORTAL.

JOYCE J.

1902

Feb. 8.

[1901 G. 2044.]

Lease — Construction — Demise of Exclusive Right of Fishing — Covenant against Assignment—Grant by Lessee of Limited Licence to Fish.

By an indenture of lease the defendant demised to the plaintiff the exclusive right of fishing in a certain portion of a river, "together with full liberty of ingress, egress, and regress for the said lessee and his authorized friends at all times" during the term thereby granted "to fish with rods and lines in a proper and sportsmanlike manner . . . . and the fish which they shall then and there take to have and retain to his and their own use." The lessee covenanted that he would not during the term "underlet, assign, transfer, or set over, or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over unto any person or persons whomsoever" without the consent in writing of the lessor, his heirs or assigns:—

Held, that, inasmuch as the covenant did not expressly apply to "any part" of the premises as well as to the whole, the lessee was not precluded from granting a licence to another person (limited to two rods) to fish in the river during the residue of the term granted by the lease.

Dictum of Lord Eldon in *Church* v. *Brown*, (1808) 15 Ves. 258; 10 R. R. 74, followed.

BY an indenture dated April 25, 1894, the defendant demised to the plaintiff "all that the exclusive right of fishing in manner hereafter mentioned" in and upon certain portions of the river Test, in the parishes of Freefolk, Laverstoke, and Overton, in the county of Southampton, "together with full liberty of ingress, egress, and regress for the said lessee and his authorized friends at all times during the term intended to be hereby granted to fish in such above-described portions of the said river Test with rods and lines in a proper and sportsmanlike manner at right and seasonable periods of the year, and without using nets or other means than the artificial fly, and the fish which they shall then and there take to have and retain to his and their own use, to have and to hold the said right of fishing and premises hereinbefore expressed to be demised unto the said lessee from September 30, 1893, for three, seven, fourteen, or twenty-one years, at the option of

JOYCE J.
1902
GROVE
v.
PORTAL.

the said lessee, or until one year's notice is given by the said lessee to determine the said tenancy on September 30, in any one of such years as aforesaid, yielding and paying therefor during the said term hereby granted the rent or sum of 300*l.*" And the lease contained a covenant by the lessee that he should not nor would during the said term "underlet, assign, transfer, or set over or otherwise by any act or deed procure the said premises to be assigned, transferred, or set over unto any person or persons whomsoever without the consent in writing of the said lessor, his heirs, or assigns being first obtained for that purpose." And the lease further provided that it should be allowed to the "lessor, his heirs, executors, and administrators, and to any person staying in his house to whom he may give leave to fish with his rod in the said waters without let or hindrance." The lease also contained a proviso for re-entry by the lessor in case of breach or non-performance by the lessee of any of the covenants or agreements therein contained. The plaintiff alleged that he had entered into an agreement with a Mr. Bryant to grant him a licence and authority to fish in that portion of the river Test comprised in the lease in the manner and for the like periods as in the lease was provided (but so that not more than two rods should be used at any time) for the whole residue then unexpired of the term granted by the lease. The defendant objected to this, on the ground that it constituted a breach of the covenant by the plaintiff not to assign or underlet, and he threatened to treat Mr. Bryant as a trespasser. The plaintiff then took out this summons for the determination of the question whether he was entitled to grant the licence to Mr. Bryant without the consent of the defendant.

Younger, K.C., and *Cassel*, for the plaintiff. The plaintiff is entitled to grant this licence. The true view of the lease is that it is a demise to the plaintiff of the exclusive right of fishing, with a proviso that it must be exercised in a sportsman-like manner within the terms of the lease. Subject to that condition, he is at liberty to authorize any person he likes to fish. There is no limitation upon his rights except this cove-

nant. The licence is not an "underletting," "assignment," or "transfer" within the covenant. The "said premises" are "the exclusive right of fishing." There must be a complete assignment by the plaintiff of the subject-matter of the lease to some other person in order to constitute a breach of the covenant: *Daly* v. *Edwardes*. (1)

The expression "authorized friends" must mean "authorized persons." There is nothing in the lease to limit the expression to "friends" in the strict sense of the term. The demise is a grant of an absolute right of property. The Court always construes such covenants as this most strictly: *Church* v. *Brown*. (2) That case is important from two points of view: (1.) as shewing the mode of construing such covenants—namely, strictly; and (2.) as deciding that there is no breach by the assignment or underletting of a part of the premises. That principle was acted on in *Crusoe* v. *Bugby* (3): see also *Gentle* v. *Faulkner*. (4)

In *Holford* v. *Bailey* (5) it was held that a sole and exclusive fishery was equivalent to a several fishery, in respect of the disturbance of which an action of trespass would lie; and in *Fitzgerald* v. *Firbank* (6) the Court of Appeal held that the grant of an exclusive right of fishing in a defined part of a river did not give a mere licence, but a profit à prendre, which was an incorporeal hereditament. The plaintiff is not seeking by this licence to assign a several fishery.

Hughes, *K.C.*, and *T. T. Methold*, for the defendant. The plaintiff's argument must go to this—that he is entitled to grant any number of licences. The licence which he is proposing to grant is a demise or grant of a profit à prendre, and it is an underletting of the premises within the meaning of the covenant. An underletting of a part of the premises is, nevertheless, an underletting. In *Church* v. *Brown* (2) it was not necessary to decide that point, and the point only rests on the dictum of Lord Eldon. In *Roe* v. *Sales* (7) Lord Ellenborough pointed

(1) (1900) 83 L. T. 548; S.C. on appeal to House of Lords sub nom. *Edwardes* v. *Barrington*, (1901) 18 Times L. R. 169.
(2) 15 Ves. 258; 10 R. R. 74.
(3) (1770) 2 W. Bl. 766.
(4) [1900] 2 Q. B. 267.
(5) (1849) 13 Q. B. 426.
(6) [1897] 2 Ch. 96.
(7) (1813) 1 M. & S. 297.

JOYCE J. 1902 GROVE v. PORTAL.

out that what was material to the landlord in such a case was the guarding against having any other than the person in whom he confides as tenant let into possession without his consent.

It is clear on this covenant that an underletting of part of the premises is a breach. This is a grant of an interest in land, and not a mere licence: *Hooper* v. *Clark* (1); *Webber* v. *Lee* (2); *Wood* v. *Leadbitter* (3); *Smith* v. *Kemp*. (4)

Apart from the covenant, the lessee has no such right as he contends for. The lease gives no right to any one except the lessee and his authorized friends. The proposed transaction is, in fact, an underletting in the guise of a licence; and an underletting of part of the premises is none the less an underletting.

[JOYCE J. What is a "letting"?]

A licence to fish even for an hour and take away the fish caught is a letting: *Holford* v. *Bailey*. (5)

[JOYCE J. This licence does not give an exclusive right to the licensee.]

It is immaterial whether it is exclusive or not, it is none the less an underletting of the premises.

This is a grant of an interest in land for a term, and is clearly an underletting.

Younger, *K.C.*, in reply. If it were not for the covenant the lessee would clearly have been entitled to assign. Otherwise there would be no necessity for the covenant, which, moreover, is a usual one. The covenant is against assigning the demised premises, i.e., "the exclusive right," and not "any part thereof." The absence of those words is vital.

[He also referred to *Combridge* v. *Harrison*. (6)]

JOYCE J. I am of opinion that this licence to Mr. Bryant for two rods is perfectly good. If the meaning of the licence were that only two rods were to be used altogether, and that Mr. Grove was to be excluded from fishing at all, so that Mr. Bryant would have an exclusive licence for two rods, and there would be no other rods on the stream, I think it would

(1) (1867) L. R. 2 Q. B. 200.
(2) (1882) 9 Q. B. D. 315.
(3) (1845) 13 M. & W. 838, 844.
(4) (1692) 2 Salk. 637.
(5) 13 Q. B. 426, 446.
(6) (1895) 72 L. T. 592.

have been well arguable that the effect of that would be to procure the premises to be transferred to Mr. Bryant. I think, also, that if the covenant against assignment had extended, not merely to "the said premises," but also to "any part of the premises," the case might have been arguable for the defendant.

But Lord Eldon says distinctly in *Church* v. *Brown* (1) that a covenant not to part with the possession of the premises "would not have restrained the tenant from parting with a part of the premises." The reason of that, no doubt, is that these covenants have always been construed with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The dictum I have quoted, so far as I can make out, has never been disapproved of. It is quoted in the text-books, and considered by the text-writers to be law. Similarly a covenant against assignment does not prevent the tenant from underletting unless the words forbid an assignment for any part of the term, and there is the same reason for that construction. Again, in *Crusoe* v. *Bugby* (2) the judgment is to this effect: "The Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning." The words there were, "assign, transfer, or set over, or otherwise do or put away this present indenture of demise, or the premises hereby demised." Then the learned judge goes on to say: "'assign, transfer, and set over' are mere words of assignment—'otherwise do or put away,' signifies any other mode of getting rid of the premises entirely." That case is mentioned by Sir William Grant in the case of *Greenaway* v. *Adams* (3), where he says: "I have no doubt upon the construction of this covenant"—that is the covenant he was considering in that particular case. "This case is not like *Crusoe* v. *Bugby* (2), where all the words of the covenant

(1) 15 Ves. 258, 265; 10 R. R. 74. (2) 2 W. Bl. 766, 767.
(3) (1806) 12 Ves. 395, 400.

JOYCE J. 1902 GROVE v. PORTAL.

could have distinct effect and operation, without referring at all to an underlease; and it did not necessarily follow, that the lessor, as he did not choose, that the tenant should assign, therefore intended to restrain underletting." I understand Sir William Grant to approve of *Crusoe* v. *Bugby*. (1)

Further, I must say, looking at the particular nature of the property demised in this case—the subject of the demise—that I doubt whether the granting of the licence to Mr. Bryant is a transfer of any part of the demised premises; but I do not decide the case upon that. I decide it upon the principle of the dictum of Lord Eldon, and I hold that by reason of the omission from the covenant of the words "any part of the premises" an assignment of a part of the premises was not forbidden.

[His Lordship accordingly declared as follows: "That the plaintiff is entitled to grant a licence to G. B. Bryant in the summons mentioned, his assigns, or any person or persons authorized by him or them, to fish in all that portion of the river Test comprised in the said lease, in the like manner and for the like periods in the said lease provided, for the whole residue now unexpired of the term granted by the said lease, provided that such licence shall not extend to or permit of fishing with more than two rods at one and the same time."]

Solicitors: *Lee & Pembertons; Winter, Bothamley & Co.*

(1) 2 W. Bl. 766, 767.

G. A. S.

JOYCE J.
1902
Feb. 10.

In re CRACE.
BALFOUR *v.* CRACE.

[1900 C. 3758.]

Principal and Surety—Guarantee—Bond to secure Fidelity of Employee—Death of Surety—Notice—Determination of Liability.

Where a bond is given by a surety for the integrity of a person, in consideration of that person's being appointed to an office by the obligee of the bond, the liability of the surety will not, unless expressly so stipulated in the bond, be determined by his death.

POINT OF LAW.

In 1882 the plaintiff, Blayney Reynell Balfour, who was the owner of certain estates in Ireland, appointed one Dolling to act as agent to his estates and receiver of the rents thereof, and, in consideration of this appointment, Dolling, and his father-in-law John Gregory Crace as his surety, executed a joint and several bond dated June 25, 1883, for the sum of 3000*l.* in favour of the plaintiff. This bond was given at the plaintiff's request by way of security for the due performance by Dolling of his duties and obligations as the plaintiff's agent and receiver.

The bond was in the following form:—

"Know all men by these presents that we, Caledon Josias Radcliffe Dolling, of 34, Mountjoy Square, in the city of Dublin, Esquire, and John Gregory Crace, of No. 38, Wigmore Street, London, in the county of Middlesex, and of Springfield, Dulwich, Esquire, are jointly and severally held and firmly bound to Blayney Reynell Balfour, of Townley Hall, Drogheda, in the city of Louth, Esquire, in the sum of 3000*l.*, to be paid to the said Blayney Reynell Balfour, or his attorney, his executors, administrators or assigns, for which payment to be well and truly made we bind ourselves and each of us, one and each and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents."

The bond then recited that Dolling had previously been

JOYCE J.
1902
CRACE, *In re.* BALFOUR *v.* CRACE.

employed by the plaintiff's predecessor in title, B. T. Balfour, as agent of the estates, and proceeded as follows:—

"And whereas the said Blayney Reynell Balfour has appointed the said C. J. R. Dolling his agent or receiver of the rents, issues, and profits of all his estates in Ireland. And whereas upon such appointment of the said C. J. R. Dolling as aforesaid the said B. R. Balfour required the said C. J. R. Dolling to enter into security for the sum of 3000*l*. And whereas the said J. G. Crace has consented to become surety for the said C. J. R. Dolling. Now the condition of the above obligation is such that if the above bounden C. J. R. Dolling shall pay or cause to be paid to the said B. R. Balfour all sums of money which shall represent the rents, issues, and profits of the said estates payable to the said B. R. Balfour as executor of the said B. T. Balfour, and shall and will from time to time and at all times hereafter as often as requested by the said B. R. Balfour, his executors, administrators, or assigns, well and truly pay or cause to be paid unto the said B. R. Balfour, his executors, administrators, or assigns, all such sum or sums of money as he the said C. J. R. Dolling shall have had or received of the said rents and profits of the said estates, and shall and will render to the said B. R. Balfour and his heirs, executors, administrators, and assigns true, just, full, and perfect accounts of all and every such sum and sums of money as shall be by him had or collected from the tenants and occupiers of the said estates, or from or on account of the rents and profits of the said estates or any part thereof, or for or on account of the said B. R. Balfour, his heirs, executors, administrators, or assigns, and shall and will while he shall continue to act as such agent or receiver well, justly, truly, and honestly in every respect conduct himself in the said office of agent or receiver of the said rents, then this obligation and every matter and thing therein contained shall be void and of no effect; otherwise the same shall remain in full force and virtue in law."

Dolling continued to act as the plaintiff's agent and receiver until about February, 1900; but in April, 1900, he executed an assignment to a trustee for the benefit of his creditors, and left

the country, having failed to account to the plaintiff for large sums received on his behalf.

J. G. Crace died on August 13, 1889, having by his will appointed the defendants to be his executors. This was an action by the plaintiff seeking to make the defendants liable upon the bond.

The defendants pleaded that the liability of their testator under the bond ceased upon his death.

By an order dated October 28, 1901, upon the application of the plaintiff, and upon an admission by him that the said J. G. Crace died on August 13, 1889, and that he, the plaintiff, had notice of the death shortly after that date, the following point of law was directed to be tried before any evidence was given or issue of fact tried, namely: "Whether the liability (if any) of the said J. G. Crace under the bond dated the 25th June, 1883, was determined on the death of the said J. G. Crace, or when such death first became known to the plaintiff." During the course of the argument the form of the question was slightly amended, and as amended read as follows: "Whether the liability (if any) of the said J. G. Crace under the bond was determined immediately or otherwise by the mere fact of his death coming to the knowledge of the plaintiff."

Hughes, K.C., and *Bryan Farrer*, for the plaintiff. It is said that Crace's liability under the bond was determined when the fact of his death was brought to the knowledge of the plaintiff; but in *Gordon* v. *Calvert* (1), which was a case upon a similar bond, where, after the surety's death, his executrix had given notice to the obligee that she should no longer consider herself liable on the bond, it was held that the liability of the surety was not determined, even although the principal had obtained another surety. The action afterwards came before Lord Tenterden (*Calvert* v. *Gordon* (2)), and he said that it was competent to the surety to stipulate that he should be discharged from all future liability, after a specified time, after notice given; but in that case, as in this, the surety had not

(1) (1828) 2 Sim. 253; 4 Russ. 581; 29 R. R. 94.
(2) (1828) 3 Man. & Ry. 124.

JOYCE J. 1902 CRACE, *In re.* BALFOUR *v.* CRACE.

done so. That that case is still good law is shewn by *Burgess* v. *Eve* (1) and *Lloyd's* v. *Harper*. (2) This case is covered by the decision in *Gordon* v. *Calvert*. (3)

Younger, K.C., and *Gregson*, for the defendants. First, we submit that under this bond the guarantor would have had the right during his lifetime to determine his liability thereunder by giving such a notice as would have afforded the plaintiff an opportunity of putting an end to the employment of the agent, or of procuring another guarantor. Secondly, knowledge on the part of the person to whom the guarantee was given of the death of the guarantor operated as a notice to determine his liability after an interval similar to that which would have been necessary in the case of a notice given by the guarantor himself. It is said that the bond is binding on the guarantor or his estate so long as the employment lasts. The opposite view is, however, supported by text-writers and by American authorities. The bond in *Gordon* v. *Calvert* (3) was different to that now under consideration. That case only decided that a notice given to the employer, determining the liability of the surety at once, was not sufficient, because it gave the employer no opportunity of covering himself against risk. Moreover, that was a decision at law upon an instrument under seal, which was then considered sacred.

In *Offord* v. *Davies* (4) it was decided that a provision in a bond limiting the liability thereunder was for the benefit of the surety, and did not deprive him of any other right which he might have had of determining his liability. *Coulthart* v. *Clementson* (5) established that a continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. In *Beckett & Co.* v. *Addyman* (6) it was held that the death of one of the co-sureties under a joint and several continuing guarantee did not of itself determine the future liability of the surviving co-surety; but Coleridge C.J. there said that it was clear that

(1) (1872) L. R. 13 Eq. 450.
(2) (1880) 16 Ch. D. 290.
(3) 2 Sim. 253; 4 Russ. 581; 29 R. R. 94.
(4) (1862) 12 C. B. (N.S.) 748.
(5) (1879) 5 Q. B. D. 42.
(6) (1882) 9 Q. B. D. 783.

in the case of a continuing guarantee for goods to be supplied or money to be advanced it was in the power of the guarantor to determine his liability: see also *In re Sherry*. (1) *Lloyd's* v. *Harper* (2) is distinguishable on the ground that there the membership of Harper could not be determined by the plaintiffs. In *In re Silvester* (3) Romer J. observed upon the reasoning of Bowen J. in *Coulthart* v. *Clementson* (4); but in *In re Whelan* (5) *Coulthart* v. *Clementson* (4) was treated as a good decision and followed by the Vice-Chancellor of Ireland, who held that the guarantee in that case was determined on the date when the bank first had knowledge of the guarantor's death.

[They also referred to *Phillips* v. *Foxall* (6), Parsons on Contracts, vol. ii. p. 31, and Rowlands on Principal and Surety, pp. 79, 82.]

Hughes, K.C., in reply. The defendant must shew (1.) that the surety could have determined his liability under the bond by notice; and (2.) that knowledge of the death of the guarantor is sufficient to determine the liability. The first point cannot be argued in the face of *Gordon* v. *Calvert* (7), which is a stronger case than the present, and *Lloyd's* v. *Harper*. (2) If the first point were established, then, no doubt, *Coulthart* v. *Clementson* (4) goes some way towards establishing the second.

JOYCE J. I think it is undoubted law that a continuing guarantee not under seal for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated. Now, the reasons for this in the case of such a guarantee are, I think, pretty obvious on a moment's consideration, and they are put very lucidly in the judgment of Erle C.J. in *Offord* v. *Davies*. (8)

When such a guarantee is under seal, I think it has been

(1) (1884) 25 Ch. D. 692.
(2) 16 Ch. D. 290.
(3) [1895] 1 Ch. 573.
(4) 5 Q. B. D. 42.
(5) [1897] 1 I. R. 575.
(6) (1872) L. R. 7 Q. B. 666.
(7) 2 Sim. 253; 4 Russ. 581; 29 R. R. 94.
(8) 12 C. B. (N.S.) 748.

JOYCE J. 1902 CRACE, *In re.* BALFOUR *v.* CRACE.

held at law that the guarantor is not entitled by notice to determine its operation. But in equity I think, even in the case of a continuing guarantee under seal, such a guarantee as that I have mentioned, where, as Lush L.J. puts it in the case of *Lloyd's* v. *Harper* (1), "the consideration is fragmentary, supplied from time to time, and therefore divisible," the operation of the guarantee as to future transactions may be determined by notice. Now, the right to determine or withdraw a guarantee by notice forthwith cannot possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given once for all, as in the case of the consideration being the giving or conferring an office or employment upon any person whose integrity is guaranteed. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee instanter. Time must be allowed—at all events, it is admitted that some time must be allowed—for a lawful determination of the employment by the person to whom the guarantee is given, and I think, with reference to a guarantee of the nature which we have to consider in the present case, many other considerations are applicable besides merely a lawful determination of the employment by giving six months' notice, or something of that kind. As I said in the course of the argument, six months' notice might determine the employment just in the midst of the audit or receipt of the rents; or the employer might be placed in such a position with reference to the person employed that it might be most inadvisable and injurious to him to put an immediate end to the employment.

If, however, such a guarantee can be determined by notice at all, the question what length of notice the employer must necessarily be entitled to, I think, has not been determined, and must depend upon the circumstances of the particular case. Now, that being so, there is no difficulty whatever to my mind in answering the question which was argued before me as it originally stood. It would have been impossible to hold that with respect to this guarantee, where there is no

(1) 16 Ch. D. 319.

stipulation to the contrary, the liability of the guarantor under the bond was determined immediately, either on the death of the guarantor or on the fact of his death coming to the knowledge of the person to whom the guarantee was given. But I am told that that is not the real question, and it was proposed to alter the question in a form which was partly suggested by myself, and the question I have to decide is whether the liability, if any, of Mr. Crace under the bond was determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff. Now, whatever the true answer to that question may be, and whether such a guarantee as this can be determined by notice or not, I certainly agree with what Romer J. says in *In re Silvester* (1), where he observed on Lord Bowen's decision in *Coulthart* v. *Clementson* (2): "I desire to add that I do not assent to the general proposition that where a person who is himself entitled to the benefits of a contract of guaranty has notice of the death of the guarantor and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that primâ facie it would be a breach of trust on the part of the executor not to give notice to determine the liability." I desire to express my entire agreement with that, whatever the proper answer be to the question whether such guarantee as that which we have to consider in this case can be determined by notice or not. Really what we have to decide is this—whether, when the guarantee is of this kind, given as part of the consideration for the appointment to an office or employment of a person by another to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his death, to have it expressly so stipulated, or does the law require the person to whom the guarantee is given to have it expressly so stipulated if the guarantee is not to be determined by notice or by the death of the guarantor? Well, after listening to the argument and giving some consideration to the case, I have come to the conclusion that upon the whole where an office

(1) [1895] 1 Ch. 573, 577. (2) 5 Q. B. D. 42.

JOYCE J. 1902 CRACE, *In re.* BALFOUR *v.* CRACE.

or employment is conferred in consideration of such a guarantee as that in this case, it is safer to hold that the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice, or to be determined by his own death. And in coming to that conclusion I rely on *Gordon* v. *Calvert* (1), and also upon what I understand to be the reasoning of the Lords Justices in *Lloyd's* v. *Harper* (2), although I have not forgotten that there was a special fact in that case, namely, that the person whose integrity was there guaranteed was in what was analogous to employment which could not be determined by Lloyd's.

Therefore I can answer this question, as altered, by saying that the liability, if any, of the said John Gregory Crace under the bond dated June 25, 1883, was not determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff.

Solicitors: *Nicholl, Manisty & Co.; Hores, Pattisson & Bathurst.*

(1) 2 Sim. 253; 4 Russ. 581; 29 R. R. 94. (2) 16 Ch. D. 290.

G. A. S.

In re NORRIS.

[1900 N. 265.]

SWINFEN EADY J.

1902

Jan. 24.

Costs — Taxation — Solicitor-Mortgagee — Negotiation Fee—Mortgagees Legal Costs Act, 1895 (58 & 59 *Vict. c.* 25), *s.* 2—*General Order under Solicitors' Remuneration Act*, 1881, *Sched. I., Part I., r.* 11.

Property belonging to D. was in mortgage. N., a solicitor, arranged that the mortgage should be paid off, that the property should be reconveyed to D., and that N. should lend his own money to D. on mortgage of the same property; and this was done. N. had not a partner with him in his business as a solicitor:—

Held, that N. was entitled to charge the scale fee for negotiating the loan.

A. J. NORRIS, whilst acting as the solicitor of a Mrs. Davies, the legal personal representative of her late husband, paid off out of his own moneys a mortgage on farms forming part of his estate, which were thereupon reconveyed to Mrs. Davies. She then executed a mortgage of the farms to Norris to secure 1041*l.* and interest.

In his bill of costs Norris included a fee of 10*l.* 10*s.* for negotiation of the mortgage to himself.

The taxing master (the late Mr. H. S. Ryland) disallowed the item, and Norris thereupon carried in an objection to the disallowance, stating as the reason for it "that under s. 2 of the Mortgagees Legal Costs Act, 1895, the solicitor is entitled to charge the negotiation fee in respect of the mortgage notwithstanding that he himself was the mortgagee."

Mr. H. S. Ryland having died, Mr. E. Shearme, taxing master, gave the following answer to the objection: "The late Taxing Master Ryland disallowed the negotiating fee on the ground that the solicitor making the loan cannot negotiate with himself. I have merely adopted his view and overruled the objection."

Norris took out a summons to vary the certificate of the taxing master, and the summons was adjourned into Court.

P. F. Stokes, for Norris. It is said that a solicitor cannot

SWINFEN EADY J.

1902

NORRIS, *In re.*

negotiate with himself. The question arises on s. 2 of the Mortgagees Legal Costs Act, 1895, which expressly gives to a solicitor to whom a mortgage is made the right to receive for "all business transacted and acts done by such solicitor in," amongst other things, "negotiating the loan . . . . all such usual professional charges and remuneration as he . . . . would have been entitled to receive if such mortgage had been made to a person not a solicitor and such person had retained and employed such solicitor . . . . to transact such business and do such acts." Under the General Order under the Solicitors' Remuneration Act, 1881, and Sched. I., Part I., to the order, a "mortgagee's solicitor for negotiating loan" is entitled to make a scale charge which has not been exceeded in the present case, and the Act of 1895 entitles a solicitor to make that charge although he is himself the mortgagee.

What amounts to negotiation is pointed out by the Court of Appeal in *In re Macgowan*. (1) "Negotiation" only means arrangement; and if the solicitor does it himself, when he is mortgagee, the charge is payable, as it would be if he had employed another solicitor to do it.

Gatey, for Mrs. Davies. There is nothing to shew that there was any arrangement as to the terms. The property was in mortgage and the solicitor took over the mortgage. Rule 11 in Sched. I., Part. I., to the General Order under the Act of 1881 says that, as to a mortgagee's solicitor, the scale for negotiating shall only apply to cases "where he arranges and obtains the loan from a person for whom he acts." To be entitled to make the charge the solicitor must not only arrange, but must also obtain the loan. The solicitor in this case did not arrange and obtain the loan, and he certainly did not do so from a person for whom he acted. Sect. 2 of the Act of 1895 includes the case of the firm to which the solicitor-mortgagee belongs, and the firm often does negotiate the loan and is entitled to charge for so doing, but the section does not mean that negotiation shall be paid for where there has not been any, and there has not been any in the present case. The solicitor here has not done more than was done in *In re Eley* (2), and there it was

(1) [1891] 1 Ch. 105. (2) (1887) 37 Ch. D. 40.

held that a negotiation fee could not be charged. [He also referred to *In re Reade*. (1)]

SWINFEN EADY J.

1902

NORRIS, *In re*.

SWINFEN EADY J. This is a summons to review the taxation of a solicitor's bill of costs. The late Taxing Master Ryland disallowed a fee charged for negotiating a mortgage. The solicitor carried in an objection to the disallowance, and Taxing Master Shearne merely adopted the view taken by Mr. Ryland. On behalf of the client it is said that the disallowance was right. And, first, it is said that the solicitor did not "arrange and obtain the loan" within the meaning of rule 11 in Sched. I., Part I., to the General Order. These are the words of the rule: "As to a mortgagee's solicitor, it"—that is to say, the scale for negotiating—"shall only apply to cases where he arranges and obtains a loan from a person for whom he acts." Did the solicitor in this case arrange and obtain the loan? The property was already in mortgage, and he arranged that the mortgagee should be paid off, and that the property should be reconveyed to Mrs. Davies, and that he should then lend the money to her on a mortgage of the property. It is not disputed that the terms are correctly stated in the mortgage deed which was executed, and in my judgment Norris did arrange and obtain the loan. But he must also do so "from the person for whom he acts." Norris did not obtain the loan from any other person, but it is said on his behalf that under the Act of 1895 when a solicitor negotiates a loan on mortgage he is entitled to the scale fee although he is himself the mortgagee. On the other hand it is contended, on behalf of the mortgagor, that the statute does not apply when a solicitor who is not in partnership himself lends the money, and that there is only negotiation by him when he acts for some other person. In my judgment, that is too narrow a construction. Sect. 2 of the Act of 1895 says that "any solicitor to whom, either alone or jointly with any other person a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such

(1) (1889) 33 Sol. J. 219.

SWINFEN EADY J.

1902

NORRIS, *In re.*

solicitor or firm in negotiating the loan" and doing certain other things "all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business, and do such acts." If Norris, the solicitor, had not himself advanced this money, but had negotiated and obtained the loan from a client, would he have been entitled to charge the negotiation fee? He clearly would have been so entitled. Then the Act of 1895 says that a solicitor-mortgagee is to be entitled to such remuneration as he would have been entitled to if the mortgage had been made to some one else who had employed him as his solicitor to transact the business. It follows that Norris is entitled to the negotiation fee. Any other construction would fail to give effect to the words "either alone or jointly" in s. 2, which shew that the statute was meant to apply to the case of a single solicitor.

The summons to vary must therefore be allowed.

Solicitors for applicant: *Norris & Norris.*

Solicitors for Mrs. Davies: *Prestons, for Ivor Harries, Rhayader.*

F. E.

SWINFEN EADY J.
1902
Feb. 14.

STEPHENS *v.* MYSORE REEFS (KANGUNDY) MINING COMPANY, LIMITED.

[1902 S. 408.]

Company—Memorandum of Association—Construction—Objects—Ancillary Powers—Declaration that all Clauses independent—Ultra Vires—Injunction.

Notwithstanding a declaration, contained in the objects clause of a memorandum of association, "that the objects specified in each paragraph of this clause shall be in nowise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company," wide powers given in general words will be construed as ancillary only to a specific object mentioned in the first paragraph.

In re German Date Coffee Co., (1882) 20 Ch. D. 169, followed.

THIS action was brought by a large shareholder in the Mysore Reefs (Kangundy) Mining Company, Limited, against the company, for a declaration that a scheme for acquiring, by means of a subsidiary company, an interest in a gold mining property in West Africa, proposed by the directors in a circular issued on January 23, 1902, was ultra vires, and for an injunction restraining the company from carrying out the scheme.

The company was incorporated on July 1, 1899, as a reconstruction of a former company which had been registered in 1897 under the name of the Mysore Reefs (Kangundy), Limited. The capital of the defendant company was 200,000*l.* divided into 160,000 ordinary shares of 1*l.* each, with 15*s.* paid up, and 40,000 fully paid preference shares of 1*l.* each. Clause 3 of the memorandum of association defined the objects for which the company was established by twenty-five paragraphs, of which the following were relied on in the argument:—

"1. To acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy), Limited (incorporated in 1897), and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect with or without modification the agreement referred to in clause 3 of the articles of association of this company."

SWINFEN EADY J.

1902

STEPHENS v. MYSORE REEFS (KANGUNDY) MINING COMPANY, LIMITED.

This was an agreement for the purchase of the business and assets of the old company from its liquidator.

"2. To acquire gold mines, mining and other rights, land, auriferous, metalliferous, or otherwise, or any interests in the same respectively in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, rights, and land or interests therein respectively."

"8. To purchase or otherwise acquire and undertake all or any part of the business, property, and liabilities of any person or company carrying on any business which the company is authorized to carry on, or possessed of property suitable for the purposes of the company."

"11. To enter into partnership or into any arrangements for sharing profits, union of interests, joint adventure, reciprocal concessions or co-operation with any person or company carrying on or engaged in, or about to carry on or engage in, any business or transaction which the company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take or otherwise acquire and hold shares or stock in or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, reissue with or without guarantee, or otherwise deal with such shares or securities.

"12. Generally to purchase, take on lease, or in exchange, hire or otherwise acquire any real or personal property, and any rights or privileges which the company may think necessary or convenient with reference to any of these objects, or capable of being profitably dealt with in connection with any of the company's property or rights for the time being."

"15. To promote any company or companies for the purpose of acquiring all or any of the property, rights, and liabilities of this company, and for any other purpose which may seem directly or indirectly calculated to benefit this company, and to underwrite or subscribe for, or procure to be underwritten or subscribed for, all or any part of the share or debenture capital of any such company.

"16. To invest and deal with the moneys of the company

not immediately required in such manner as may from time to time be determined."

"25. To do all such things as are incidental or conducive to the attainment of the above objects, and so that the word 'company' in this clause shall be deemed to include any partnership or other body of persons, whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere, and so that the objects specified in each paragraph of this clause shall, except when otherwise expressed in such paragraph, be in nowise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company."

The company soon after its incorporation sent out mining experts to India to report upon the mining property which they had taken over from the old company. They reported that it was undesirable to spend more money upon the property, and mining operations were then wholly abandoned. The directors then tried to find and acquire a new property, and on January 23, 1902, they sent out a circular to the shareholders, announcing that the directors had had before them several offers of mining properties, and had entered into negotiations with a view to acquiring a property in the British Gold Coast, West Africa, on the following terms:—

"It is proposed to obtain an option, during the period of which the mine would be examined and reported on by a mining engineer selected by the board, and in the event of his report being satisfactory the same would be submitted to the shareholders for their approval.

"A subsidiary company would then be formed with a capital of 75,000*l.*; the purchase price to be 25,000*l.*, payable entirely in shares, leaving a working capital of 50,000*l.*, of which 30,000*l.* would be subscribed by this company, and 20,000 shares would be held in reserve."

It was also announced that a general meeting would be held in due course to ascertain the views of the shareholders on this proposal; and that it was intended to provide the 30,000*l.* which the company was to subscribe by calling up 4*s.* per share, which still remained uncalled, upon the ordinary shares.

SWINFEN EADY J.

1902

STEPHENS v. MYSORE REEFS (KANGUNDY) MINING COMPANY, LIMITED.

The plaintiff was the holder of 6454 preference and 2788 ordinary shares. It was stated that all the other shareholders supported the proposal of the directors.

The plaintiff now moved for an injunction.

Micklem, K.C., and *Dickinson*, for the plaintiff. The proposal is to carry on financial operations in West Africa, and it is not within the words of any paragraph of the objects clause. But even if it could be brought within the wide powers given by the sub-sections, they must be construed as subsidiary to the main purpose of the company, which is stated in the first sub-section: *In re German Date Coffee Co.* (1); *In re Crown Bank* (2); *In re Amalgamated Syndicate.* (3)

[SWINFEN EADY J. referred to *In re Haven Gold Mining Co.* (4)]

Sub-s. 25, which is taken from Mr. Palmer's Company Precedents, 8th ed. Pt. I. p. 426, was probably intended to prevent the application of those cases; but it is ineffectual in such a case as this. If it applied literally, the company might carry on any business of any kind, and the whole purpose of having its objects defined by the memorandum would be defeated.

Eve, K.C., and *Martelli*, for the company. In this case the draftsman has done what the draftsman in the *Amalgamated Syndicate* (3) and other cases failed to do: he has stated a succession of independent objects without making any one of them a main object. A company may have several wholly different and independent objects. The memorandum of association must be construed fairly as a whole. In *New Zealand Gold Extraction Co.* v. *Peacock* (5) Davey L.J. says that a memorandum must not be construed so as to make a scheme ultra vires which is otherwise unobjectionable.

All the cases cited were cases of winding-up; and it was held on the construction of the particular memoranda that each of the companies had one main object, and when that

(1) 20 Ch. D. 169.
(2) (1890) 44 Ch. D. 634.
(3) [1897] 2 Ch. 600.
(4) (1882) 20 Ch. D. 151.
(5) [1894] 1 Q. B. 622, 632.

could not be effected the substratum of the company was gone. That appears clearly from *In re Coolgardie Consolidated Gold Mines, Limited.* (1) Here the company has several separate and distinct objects, and there is no ground for saying that any one of them is ultra vires.

SWINFEN EADY J. (after stating the facts of the case). The defendant company oppose the motion, and say that the proposed scheme is within the scope of their memorandum of association according to its literal construction as a whole, and in particular within the scope of paragraphs 8, 11, 12, and 15. But if not, they call paragraph 25 in aid of the construction.

In my opinion, the right way to construe the memorandum of association is to take the first paragraph of clause 3, as stating the principal or primary object for which the company is formed, i.e., "to acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy), Limited." Then the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that main object. It is right to give a liberal construction to these subsidiary paragraphs to enable the main object of the company to be carried out. But it is not right to accept a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever. I think I am precluded from so wide a construction, not only by the general principles of construction, but by the several authorities cited by counsel for the plaintiff, and particularly by Lindley L.J.'s judgment in the case of *In re German Date Coffee Co.* (2): "In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one

(1) (1897) 76 L. T. 269. (2) 20 Ch. D. 188.

SWINFEN EADY J.

1902

STEPHENS v. MYSORE REEFS (KANGUNDY) MINING COMPANY, LIMITED.

thing into a company for importing something else, however general the words are."

It seems to me that every line of that statement is applicable to the present case.

Construing then this memorandum fairly and reasonably, as it ought to be construed, I am of opinion that the proposed scheme is not authorized by the memorandum.

But it is said that I must take paragraph 25 into special consideration. It is said that this paragraph was not present in the cases which were cited, and that it is sufficient to make the object contained in each preceding paragraph a separate and independent object of the company. I do not so read the memorandum, nor do I think that is the proper effect of paragraph 25. The paragraph, in fact, cannot have any such wide meaning. Paragraph 17, for instance, is as follows: "To procure the company to be registered or recognised in any part of the world." It would be obvious nonsense to read this alone, as an independent object, because of paragraph 25. It is quite true that a company is not necessarily confined to one object. It may have two or more definite different objects. But unless all these different objects are set out with reasonable clearness in the memorandum of association, then s. 8 of the Companies Act, 1862, has not been complied with. A mere stringing together of a large number of very wide powers does not satisfy that section. The company's counsel suggested that this construction would treat paragraph 25 as illegal. I do not think that it is illegal. The question is what is its proper effect when read in conjunction with the other paragraphs. I wish, however, to guard against unduly restricting the construction of the powers contained in a memorandum of association when applicable to the furtherance of the main object of the company.

Under these circumstances I must grant the injunction claimed by the plaintiff.

Solicitor for plaintiff: *C. W. Rawlinson.*

Solicitors for defendant company: *Francis & Johnson.*

J. R. B.

SWINFEN EADY J.

1902

Feb. 26.

In re BOZZELLI'S SETTLEMENT. HUSEY-HUNT *v.* BOZZELLI.

[1901 B. 997.]

Conflict of Laws—Marriage—Capacity—Italian Subjects — Italian Domicil —Italian Marriage—Deceased Husband's Brother—Lord Lyndhurst's Act (Marriage Act), 1835 (5 & 6 *Will.* 4, *c.* 54), *s.* 2.

A naturalised Italian domiciled in Italy married her deceased husband's brother, an Italian domiciled in Italy. The marriage, which was solemnized in Italy, after the necessary dispensations had been obtained, was admittedly valid in Italy:—

Held, that, notwithstanding Lord Lyndhurst's Act, the marriage was valid in England.

Semble, the law of the common domicil is sufficient to determine marriage capacity, except in the case of marriages stamped as incestuous by the general consent of Christendom.

ORIGINATING SUMMONS.

By a marriage settlement, dated November 15, 1871, and made between the intended wife, an Englishwoman domiciled in England, of the first part, the intended husband, an Italian domiciled in Italy, of the second part, and trustees resident in the United Kingdom of the third part, certain funds were settled on trust for the wife for life, and after her death (subject to a power enabling her to appoint a life interest to the husband if he survived her) upon the usual trusts for the children of the marriage; and it was provided that if the wife survived the husband she might by deed or will appoint one-third of the settled funds, subject to her own life interest, in favour of a subsequent husband and the children of a subsequent marriage.

The marriage was solemnized on November 16, 1871, in the communal hall at Naples, and subsequently in the cathedral church of Nola according to the rites of the Roman Church, of which the spouses were members. There were three children of this marriage.

The husband died on November 29, 1879, still being an Italian subject domiciled in Italy, where his wife continued to reside after his death, without changing the Italian nationality or domicil acquired on her marriage.

SWINFEN EADY J.

1902

BOZZELLI'S SETTLEMENT, *In re.*

HUSEY-HUNT *v.* BOZZELLI.

In 1880 the wife, having obtained the necessary dispensations from the civil and ecclesiastical authorities, married her deceased husband's brother, an Italian subject domiciled in Italy. The marriage was solemnized on December 11, 1880, in the communal hall of Milan, and subsequently according to the rites of the Roman Church in the church of St. Carlo, Milan. There were several children of this marriage, which was admittedly valid according to Italian law.

The wife being desirous of exercising her power of appointment in favour of her second husband and the children of her second marriage, this summons was issued to determine whether that power was exercisable, the question being whether the second marriage was valid according to English law.

McMullan, for the trustees of the settlement, stated the question.

Austen-Cartmell, for the children of the first marriage. The second marriage is rendered absolutely null and void by s. 2 of Lord Lyndhurst's Act (5 & 6 Will. 4, c. 54), which provides that, "All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." The prohibited degrees are those declared by 25 Hen. 8, c. 22, s. 3, and 28 Hen. 8, c. 7, s. 11, to be prohibited by God's laws—*Reg.* v. *Chadwick* (1)—and include marriage with a deceased husband's brother.

Such a marriage having been declared incestuous by the statutes of Henry VIII., and subsequently nullified by Lord Lyndhurst's Act, cannot be upheld in an English Court. Vide the observations of Lord St. Leonards in *Brook* v. *Brook*. (2) It is true that the observations of Lord Campbell (3) and Lord Cranworth (4) suggest that such a marriage may be good all over the world, if valid by the law of the domicil, but the point has never been affirmatively decided.

The only decision in *Brook* v. *Brook* (5) was that conformity

(1) (1847) 11 Q. B. 173.
(2) (1861) 9 H. L. C. 193, 233.
(3) 9 H. L. C. 212.
(4) Ibid. 226.
(5) 9 H. L. C. 193.

to the law of the domicil is a necessary element of marriage capacity. Non constat that it is sufficient to validate the marriage. The same observation applies to *Sottomayor* v. *De Barros* (1) and *Mette* v. *Mette* (2), which, like *Brook* v. *Brook* (3), were merely instances of marriages being held invalid for non-conformity with the law of the domicil. They shew that all valid marriages must conform to that law; but the converse of this proposition has never been established, and the question is still open: Dicey on the Conflict of Laws, p. 645.

[SWINFEN EADY J. Is there any authority as to the legitimacy of the children of such a marriage?]

No. In *In re Goodman's Trusts* (4) legitimatio per subsequens matrimonium was recognised in a case where the parents were domiciled in Holland, and the child claimed a share of personalty under the Statute of Distribution (22 & 23 Car. 2, c. 10). But there was no question as to the validity of the marriage.

T. J. C. Tomlin, for the wife, the second husband, and the children of the second marriage. The wife became an Italian subject on her first marriage: Naturalisation Act, 1870 (33 & 34 Vict. c. 14), s. 10. The second marriage, therefore, being valid by the law of the domicil, nationality, and lex loci contractûs, and not being incestuous by the general consent of Christendom, is undoubtedly valid in England.

SWINFEN EADY J. It is not disputed that the general principle is that the domicil of the parties governs the essentials of the contract of marriage. In the present case that domicil was Italian, and both husbands were Italian subjects. It is contended, however, that marriage with a deceased husband's brother is forbidden by Lord Lyndhurst's Act, and that it is contrary to the law of God and cannot be recognised in an English Court. The leading case on the subject is *Brook* v. *Brook*. (3) In that case a man married his deceased wife's sister in Denmark, where such a marriage is valid. The spouses, however, being British subjects domiciled in England, it was held that the marriage was invalid according to English

(1) (1877) 3 P. D. 1.
(2) (1859) 1 Sw. & Tr. 416.
(3) 9 H. L. C. 193.
(4) (1881) 17 Ch. D. 266.

SWINFEN EADY J.

1902

BOZZELLI'S SETTLEMENT, *In re.* HUSEY-HUNT *v.* BOZZELLI.

law, the law of the domicil being held to govern the case. The importance of the case lies in the observations of the Law Lords.

Lord Campbell L.C. says (1): "A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native born English subjects, who had abandoned their English domicile, and were domiciled in Denmark."

He therefore treats the law of the domicil as governing marriage capacity, even in the case of marriage with a deceased wife's sister, and even though the parties are native born English subjects who have obtained a foreign domicil, the case being all the stronger if they are foreigners domiciled abroad.

Lord Cranworth says (2): "It was contended that, according to the argument of the respondent, such a marriage, even between two Danes, celebrated in Denmark, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our laws (3) which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction." After referring to the opinion of Sir Cresswell Cresswell in the Court below, Lord Cranworth proceeds to deal with the matter on principle as follows: "I cannot, however, refrain from expressing my dissent from that part of Sir Cresswell Cresswell's able opinion, in which he repudiates a part of what is said by Mr. Justice Story as to marriages which are to be held void on the ground of incest. That very learned writer, after stating (s. 113) that marriages valid where they are contracted, are, in

(1) 9 H. L. C. 212. (2) 9 H. L. C. 226.

(3) *Sic.*

general, to be held valid everywhere, proceeds thus: 'The most prominent, if not the only known exceptions to the rule, are marriages involving polygamy or incest; those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the laws of their own countries.' And then he adds that, 'as to the first exception, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous.' With this latter portion of the doctrine of Mr. Justice Story, Sir Cresswell Cresswell does not agree. But I believe that this passage, when correctly interpreted, is strictly consonant to the law of nations. Story, there, is not speaking of marriages prohibited as incestuous by the municipal law of the country. If so prohibited, they would be void under his second class of exceptional cases; no inquiry would be open as to the general opinion of Christendom. But suppose the case of a Christian country, in which there are no laws prohibiting marriages within any specified degrees of consanguinity or affinity, or declaring or defining what is incest; still, even there, incestuous marriages would be held void, as polygamy would be held void, being forbidden by the Christian religion. But then, to ascertain what marriages are, within that rule, incestuous, a rule not depending on municipal laws, but extending generally to all Christian countries, recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subjects of such a country were guilty of incest in contracting a marriage allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries, it would be considered to be against God's laws. I have thought it right to enter into this explanation, because it is important that a writer so highly and justly respected as Mr. Justice Story should not be misunderstood, as, with all deference, I think he has been in the passage under consideration." Lord St. Leonards took a different view on the point, and his

SWINFEN EADY J.

1902

BOZZELLI'S SETTLEMENT, *In re.*

HUSEY-HUNT *v.* BOZZELLI.

observations (1) are no doubt inconsistent with the above passages.

The question of a polygamous marriage came before the Courts in *Hyde* v. *Hyde*. (2) In that case a single man went through the form of marriage with a single woman in a country where polygamy was lawful, both parties professing the Mormon faith under which polygamy was allowed. It was held by the Judge Ordinary that this was not a marriage as understood in Christendom, and that although it was a valid marriage by the lex loci, and at the time when it was contracted both parties were single and competent to contract marriage, the English Matrimonial Court would not recognise it as a valid marriage in a suit to enforce matrimonial duties or to obtain relief for a breach of matrimonial obligations. That is an instance in which a marriage valid by the lex loci was not recognised in England as being contrary to the law of Christendom.

In the present case I have a marriage which is not only valid according to the law of the particular domicil, but is also valid by the law of many other countries, and certainly cannot be regarded as incestuous by the general consent of Christendom.

The next case is *Sottomayor* v. *De Barros*. (3) In that case two first cousins domiciled in Portugal were married in England. Their marriage being incestuous and illegal by the law of Portugal was declared null and void in this country, on the ground that it was invalid by the law of the domicil.

That is another instance which shews that the capacity of the parties must be determined by the law of their domicil.

In that case the Court of Appeal said: "If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. (4) It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the

(1) 9 H. L. C. 233.
(2) (1866) L. R. 1 P. & M. 130.
(3) 3 P. D. 1, 5.
(4) Vide *Sottomayer* v. *De Barros*, (1879) 5 P. D. 94, 100.

law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised. In argument several passages in Story's Conflict of Laws were referred to, in support of the contention that in an English Court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story is given in *Brook* v. *Brook* (1) by Lord Cranworth (2) and by Lord Wensleydale (3), who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicile."

In this case I have to deal with a marriage which is valid by the law of the domicil, and which is not stamped as incestuous by the general consent of Christendom. I therefore declare that the marriage is valid, and that the wife can exercise the power.

Solicitors: *Attree, Johnson & Ward, for Hunt, Currey, Nicholson & Co., Lewes.*

(1) 9 H. L. C. 193. (2) 9 H. L. C. 227, 228.
(3) 9 H. L. C. 241, 242.

G. R. A.

SWINFEN EADY J.

1902

Feb. 21, 22, 25; *March* 6.

In re A. & A. CROMPTON & CO.'S TRADE-MARK.

Trade-mark—Rectification of Register—Combination of Devices—Essential Particulars—Prior Mark—Non-distinctive Addition—Simultaneous Visibility—Too wide Registration—Patents, Designs, and Trade Marks Acts, 1883 (46 & 47 *Vict. c.* 57), *s.* 64; 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

A trade-mark consisting of a combination of devices on labels was registered on an application which stated the essential particulars as follows:—

"The essential particular of the trade-mark is the combination of devices, and we disclaim any right to the exclusive use of the added matter except in so far as it consists of our own name and address."

The labels appeared on the application and register in the manner in which they were used:—

Held, that the essential particulars were sufficiently stated within the meaning of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888.

A registered trade-mark will not be removed at the instance of a rival trader merely because it consists of a combination of a prior mark with a non-distinctive addition.

In re Player & Sons' Trade-mark, [1901] 1 Ch. 382, distinguished.

It is not necessary that all the parts of a combination should appear on one label or be visible at once.

In re Spencer's Trade-marks, (1886) 3 Rep. Pat. Cas. 73, followed.

If a mark is registered for too wide a class of goods, the proper remedy is restriction, not removal.

Edwards v. *Dennis*, (1885) 30 Ch. D. 454, followed.

MOTION.

This was a motion by the defendants to an action for infringing the plaintiffs' trade-mark asking to remove that trade-mark from the register.

The trade-mark in question—No. 107,354 in class 23—was registered on June 18, 1894, in respect of Cotton Yarn and Sewing Cotton not on spools or reels.

The trade-mark consisted of the combination of devices shewn on three oblong labels with plain borders.

The largest label merely contained a statement in nine different languages describing the quantity and weight of yarn, with the plaintiffs' name written diagonally across it.

The medium label contained two shields with heraldic devices, surmounted by crests, and supported by leaves and

flowers. The plaintiffs' name was printed on a scroll at the base, and also perforated in large letters extending in a semi-circle across and beyond the label at both ends. The plaintiffs' address was printed at the foot of the label.

The smallest label was the same as the medium label, without the perforation.

The latter labels were merely reproductions in different sizes of a mark registered in 1876 which belonged to the plaintiffs.

The application for registration dated January 10, 1894, to which the labels were affixed in such a way as to shew the mode of user, originally contained a statement of the essential particulars with a disclaimer, which was objected to by the comptroller, and by his desire this statement and disclaimer were amended by substituting therefor the following words: "The essential particular of the trade-mark is the combination of devices, and we disclaim any right to the exclusive use of the added matter except in so far as it consists of our own name and address."

The trade-mark so constituted was entered on the register with the above statement of the essential particular and the disclaimer.

The plaintiffs had hitherto used the trade-mark by pasting the largest and smallest labels on different sides of the outside wrappers of their bundles of yarn, and the medium label on the inside wrappers. There was no evidence as to user in respect of goods other than yarn. The defendants, who were dealers in yarn, were alleged to have infringed the trade-mark in respect of yarn.

Clare and *Kerly*, for the defendants. There are four objections to this trade-mark.

First, the application did not state the essential particulars as required by s. 64 of the Patents, Designs, and Trade Marks Act, 1883, amended by s. 10 of the Act of 1888. (1)

(1) The amended section provides as follows:—

Sect. 64: "(1.) For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars:

"(*a*) A name of an individual or firm printed, impressed, or woven in some

SWINFEN EADY J.

1902

A. & A. CROMPTON & Co.'s TRADE-MARK, *In re.*

Secondly, the so-called combination of devices is not proper subject-matter of a trade-mark within the section. It is merely a combination of three labels, the largest of which is non-distinctive, and the other two are simply reproductions of a prior mark, and therefore not proper subject-matter for registration, duplicate registration being superfluous and unlawful: *In re Player & Sons' Trade-mark.* (1)

Thirdly, the combination is not used as a trade-mark, as two of the labels being placed on different sides of the package, and one inside, they are not all visible at once. A hidden user is clearly insufficient: *In re Kinahan & Co.'s Application.* (2)

Fourthly, the plaintiffs use and apparently intend to use the mark for nothing but yarn; so the registration is too wide: *John Batt & Co.* v. *Dunnett* (3); *Edwards* v. *Dennis* (4); *Hargreave* v. *Freeman.* (5)

The defendants, who deal in yarn and may want to deal in sewing cotton, are persons aggrieved by the wrongful registra-

---

particular and distinctive manner; or

"(*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or

"(*c*) A distinctive device, mark, brand, heading, label, or ticket; or

"(*d*) An invented word or invented words; or

"(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name.

"(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

"(3.) Provided as follows:

"(i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof:

"(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before the thirteenth day of August one thousand eight hundred and seventy-five, may be registered as a trade-mark under this part of this Act."

(1) [1901] 1 Ch. 382.

(2) (1893) 10 Rep. Pat. Cas. 393.

(3) [1899] A. C. 428.

(4) 30 Ch. D. 454.

(5) [1891] 3 Ch. 39.

tion within the meaning of s. 90 of the Act of 1883, and as such entitled to have the mark removed. The fact that they are sued on the trade-mark is in itself sufficient to give them a locus standi: *In re Apollinaris Company's Trade-marks.* (1)

Sebastian, for the plaintiffs. First, the application follows the usual office form for a combination of devices. There are many similar instances in the current numbers of the *Trade Marks Journal.* If there is any real doubt as to its validity, the comptroller ought to be represented.

Secondly, the combination of the three oblongs plus the devices plus the perforation is good subject-matter, and as such it has been used and registered. *In re Player & Sons' Trade-mark* (2) was the case of an application to register. This is an application to remove, to which wholly different considerations apply. Labels may be registered as a combination: *In re Clément & Cie.'s Trade-mark* (3); and a combination may be protected as such though part is disclaimed: *Thomas Hubbuck & Son, Limited* v. *William Brown, Sons & Co.* (4) Registration as a whole being compulsory in the case of old marks—*In re Spencer's Trade-marks* (5); *Richards* v. *Butcher* (6)—should surely be permitted for new marks.

Thirdly, the user is sufficient though the three labels are not visible at once, and though one is on the inner wrapper: *In re Spencer's Trade-marks* (5); *Richards* v. *Butcher* (6); *In re Powell's Trade-mark* (7); *Moet* v. *Clybouw* (8); *Moet* v. *Pickering* (9); *Moet* v. *Couston* (10); *Ponsardin* v. *Peto.* (11) The point as to the concealed mark was left undecided in *In re Kinahan & Co.'s Application.* (12)

Fourthly, the objection that the mark is only used and intended to be used for yarn has been taken at the last moment. There is no evidence on the point, and the objection must be disregarded. In any case it would be a strange thing if the defendants could have the mark removed on the ground

(1) [1891] 2 Ch. 186, 224, 228.
(2) [1901] 1 Ch. 382.
(3) [1900] 1 Ch. 114.
(4) (1900) 17 Rep. Pat. Cas. 638.
(5) 3 Rep. Pat. Cas. 73.
(6) [1891] 2 Ch. 522.
(7) [1893] 2 Ch. 388.
(8) (1877) Seb. Dig. 316.
(9) (1878) 8 Ch. D. 372.
(10) (1864) 33 Beav. 578.
(11) (1863) 33 Beav. 642.
(12) 10 Rep. Pat. Cas. 393.

SWINFEN EADY J.

1902

A. & A. CROMPTON & Co.'s TRADE-MARK, *In re.*

that it covers goods in which they do not deal and in respect of which they are not sued.

Clare, in reply.

Cur. adv. vult.

March 6. SWINFEN EADY J. The first ground upon which the defendants base their case is that the essential particulars are not sufficiently stated in the application to register. It appears that the application in writing as at first carried in to the comptroller did contain some description in writing of the essential particulars, but this was altered (and, as I gather, at the request of the comptroller) to the form in which it now appears on the register, describing it as "a combination of devices," and leaving any one to refer to the actual combination registered to see for themselves of what the trade-mark consists. I am told that this is now a common form in the office of the comptroller, and Mr. Sebastian referred to some current numbers of the *Trade Marks Journal* as shewing how general the practice is. However that may be, I am of opinion that the description is sufficient. Where the labels themselves appear upon the register, and in the manner in which they are used, the description is, in my opinion, sufficient. The eye frequently enables a better idea to be formed of a trade-mark than any verbal description would have done. In *Eno* v. *Dunn* (1) the Lord Chancellor, after stating the results of comparing two trade-marks, which he placed side by side, added that no verbal description of the difference did entire justice to the dissimilarity of the two trade-marks.

It was next urged that the trade-mark was not really a trade-mark at all, but, if anything, it was three trade-marks, which could not be registered as one mark, and it was contended that there could not be a valid trade-mark consisting only of a combination of two old labels, each separately registered as a trade-mark, together with something not distinctive at all. In support of this proposition reliance was placed upon *In re Player & Sons' Trade-mark* (2), where Cozens-Hardy J. refused to direct the comptroller to proceed with the registration of a mark

(1) (1890) 15 App. Cas. 252, 255. (2) [1901] 1 Ch. 382.

which, in all its essentials, was the same as an earlier registered trade-mark of the same applicant, on the ground that it was superfluous. If the mark had been registered, however, by the comptroller in that case, it does not follow from the decision of Cozens-Hardy J. that upon an application by a rival trader it would necessarily have been taken off the register. How is he aggrieved by its registration? If his contention is that registration of the mark is superfluous, as the registration adds nothing to existing rights, then he is not injured by that registration. If, however, registration prevents him from doing anything which, but for the registration, he could lawfully do, then it follows that registration was not superfluous, but has secured to the party registering some additional right. Nor has the argument that the mark is in reality three trade-marks any validity. Provided that the mark complies with the requisites of s. 64 of the Act of 1883, the whole mark need not appear on any one ticket, label, stamp, or impression. A combination of several different marks, like that which was the subject of the dispute in *Robinson* v. *Finlay* (1), and which is very common among dealers in cotton goods, may be treated as equivalent to a single mark. In *In re Spencer's Trade-marks* (2), where the words "diamond cast steel" were on one side of files and the corporate mark of the maker on the other side, the Court held that the words "diamond cast steel" had not been used alone as a trade-mark; they treated the marks on both sides of the file as together constituting one mark. In that case Lord Esher M.R. said: "Therefore what was used before 1875 by this gentleman, was one distinguishing mark, which one mark was a combination of a mark which had been granted to his father by the Cutlers' Company, and a mark which he invented himself. The two together being put on his goods in order to distinguish his goods that made it one trade-mark, and I do say this distinctly that whether the things which are put on to make a distinction (for that is all that is wanted) are put close together, or are put at two ends of the same goods, or are put one on one side of the goods and one on the other, if they are on the goods for the purpose of making a

(1) (1878) 9 Ch. D. 487. (2) 3 Rep. Pat. Cas. 73, 74.

SWINFEN EADY J.

1902

A. & A. CROMPTON & Co.'s TRADE-MARK, *In re.*

distinction they are one mark, and the mere fact that, on the files, they have been put on the two sides, does not make them separate marks,—certainly not the separation which is relied on here,—even though the name of the person is not a part of the mark." In the present case the plaintiffs use the combination of the three labels to distinguish their goods. To apply what the Master of the Rolls said, in the case just cited, the moment a trader puts on his goods three labels, it is clear, it is an inevitable business result, that he puts them all three on in order that all three being there may distinguish his goods.

It was next urged that the plaintiffs had never used and never intended to use the combination mark in question as a trade-mark. It was not disputed that the plaintiffs had used the three labels in combination upon their goods to a large extent, but it was said that two labels were placed outside the wrapper, and the third label inside the wrapper, and that it was necessary that all the labels should be visible at once to constitute a user as one trade-mark. In my judgment there is no foundation for this contention. It must very frequently happen that if labels or tickets are put at different ends, or different sides of packages, or if a portion of a mark is stamped or impressed on one side of any article and the other portion on the other side, the whole mark cannot be seen at the same time; the goods may have to be turned over, or turned round, but yet it cannot be doubted that marks so used are being properly used as trade-marks.

A further point was made that the plaintiffs have only used their registered mark for cotton yarn, and only intend so to use it, whereas they have registered it in class 23 for cotton yarn and sewing cotton not on spools or reels. It does not appear that the defendants deal in sewing cotton, or are in any way affected by the registration, except so far as yarn is concerned, and in any case their remedy would be to rectify the register by limiting the trade-mark to those articles in the class in connection with which it was being actually used, as was done in *Edwards* v. *Dennis* (1), and not to strike the mark off the

(1) 30 Ch. D. 454.

register altogether. No application has been made to me on the present motion to limit the plaintiffs' mark to yarn. The result is that the motion fails, and must be refused with costs.

SWINFEN EADY J.
1902
A. & A. CROMPTON & Co.'s TRADE-MARK, *In re.*

Solicitors: *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester; Woodcock Ryland & Parker, for Tweedale, Sons & Lees, Oldham.*

G. R. A.

In re HASLAM & HIER-EVANS.

C. A.
1902
Feb. 26; *March* 20.

Solicitor and Client—Commission—Surcharge—Taxation—Disclosure—Duty to advise—Bargain with Client.

Solicitors who were retained by O. to act for him in negotiating the purchase of a patent had previously obtained from the vendor of the patent a commission note under which they were to receive certain payments in the event of a purchaser being found by them: this note was shewn to O. by the solicitors and remained in his possession some days previously to the contract for sale being entered into. O. purchased the patent, and the solicitors with his knowledge recovered payment from the vendor of 210*l.* for commission. O. died, and the solicitors delivered their bill of costs to his executors, who on taxation sought to surcharge the solicitors with the 210*l.* so received by them: the taxing master allowed the surcharge. On a summons to review this finding:—

Held, affirming the decision of Kekewich J., that O.'s executors were not entitled to treat the 210*l.* paid by the vendor to the solicitors as money received to O.'s use, or in any way to surcharge them; that the rule applied in *O'Brien* v. *Lewis*, (1863) 32 L. J. (Ch.) 569, did not govern the present case, as the commission was paid, not by the client, but by the vendor; but that the solicitors had made a bargain which was not merely improper, but such as to place them in a position in which it was impossible for them to fulfil the duties which they had undertaken to both vendor and purchaser of the patent.

APPEAL from a decision of Kekewich J.

This was a summons to review taxation which raised the question whether the solicitors, whose bill of costs was being taxed, were entitled to retain a sum of 210*l.* for commission, paid to them under the following circumstances.

In January, 1899, Haslam, a solicitor, received from Elliot, the owner of a patent, the following commission note: "In the event of your introducing to me a purchaser whose terms I

C. A. 1902 HASLAM & HIER-EVANS, *In re.*

may accept for the United Kingdom rights of Keats' Patent Marine Engine Governor, I hereby agree to pay you as follows: the sum of 250*l.* out of a purchase price of 3750*l.*, or the sum of 300*l.* out of a purchase price of 4000*l.*, and an additional 100*l.* for every 1000*l.* additional purchase price beyond 4000*l.*, and pro ratâ for any part of 1000*l.* I will pay the above sums to you upon receiving the cash for sale of the United Kingdom rights. This letter is not to be taken as giving any option over the same patent rights for the United Kingdom." Haslam introduced the patent to a Mr. Ohlson, for whom Haslam and his partner Evans had been acting as solicitors in several other matters. Ohlson instructed Haslam to make an appointment for him to see the patented article, and on January 17 Haslam and his partner accompanied Ohlson to Harley Street for the inspection. On their return Haslam shewed the commission note to Ohlson, who said that he should not pay the lowest price therein mentioned, and that if he could not get the patent at a much lower figure he should not buy at all. Haslam and his partner explained to Ohlson that they were not quite satisfied with this note; but upon Ohlson promising to allow them a reasonable commission, in case they were unable to obtain any under the original note, they agreed not to try and obtain a more satisfactory note from Elliot. The commission note was handed to Ohlson, and remained in his possession for some days previously to the contract for the purchase of the patent by him being entered into. It appeared from the bill of costs that Haslam & Evans received instructions from Ohlson to try and negotiate with Elliot for a reduction of the price of the patent, and that they did so, and eventually the purchase of the patent by Ohlson was carried out for 3000*l.* Haslam & Evans subsequently brought an action against the vendor, Elliot, for their commission on the sale of the invention and certain reserved royalties, and this action was, with Ohlson's knowledge, compromised by the payment into court of 210*l.* by the vendor, which was accepted by Haslam & Evans. In December, 1900, Ohlson died, and Haslam & Evans delivered their bill of costs to his executors, who procured an order for its taxation. The taxing master held that the solicitors were

liable to account for the 210*l.*, as received by them on behalf of Ohlson. Objections to the allowance of this surcharge were carried in, which were disallowed by the taxing master on the ground that the solicitors were not entitled to obtain this sum at the expense of their client, unless they had an agreement in writing to that effect. On a summons to review, Kekewich J. held that the sum in question was a commission received by the solicitors with the consent of their client, and remitted the bill to the taxing master with an intimation that the surcharge ought not to be allowed.

Ohlson's executors appealed.

T. L. Wilkinson, for the appellants. Solicitors are not entitled to make a gain for themselves beyond their fair remuneration at the expense of their client: to accept commissions, under the circumstances of this case, was a breach of duty to the client. The principle is clearly established by *Tyrrell* v. *Bank of London*. (1) The fact that Ohlson knew of this commission note is not enough: the confidential relationship of solicitor and client being in existence, mere knowledge of the fact that the vendor was going to pay a commission will not do: Ohlson ought to have had competent and independent advice before agreeing to the commission note: *Rhodes* v. *Bate*. (2) It was the duty of these solicitors to have advised Ohlson that, as his solicitors, they were not entitled to take this commission; and if he had then authorized them to receive it, the case might be different; but he had no advice of this kind from these solicitors, and no other independent advice, and consequently the transaction cannot be allowed to stand: *Liles* v. *Terry* (3); *Barron* v. *Willis*. (4) The taxing master was therefore right in allowing this surcharge.

J. B. Matthews, for the respondents, the solicitors. There was no concealment of the commission note: it was shewn to Ohlson and he consented to it; this is not the case of a bargain with the client for extra remuneration; the commission was paid by the vendor, not by Ohlson.

(1) (1862) 10 H. L. C. 26.
(2) (1866) L. R. 1 Ch. 252.
(3) [1895] 2 Q. B. 679.
(4) [1900] 2 Ch. 121.

C. A. 1902

HASLAM & HIER-EVANS, *In re.*

[STIRLING L.J. Was it not the duty of these solicitors to tell their client plainly, "You must relieve us from our liability to refund to you everything we get from Elliot"?]

No, not if there was full disclosure of all the facts as there was here: *In re Olympia, Limited* (1); *Erlanger* v. *New Sombrero Phosphate Co.* (2) The duty of a solicitor to his client is not higher than the duty of a promoter to his company; if the client thoroughly understands and knows that the solicitor is going to make a profit out of the transaction in addition to the ordinary costs, so that the client can decline to allow the profit to be so made, that is sufficient to entitle the solicitor to retain the extra profit when made. Ohlson knew that commission was to be paid, and he raised no objection.

[STIRLING L.J. Can we assume that Ohlson knew that if commission was paid by the vendor, he, Ohlson, would be entitled to it?]

As there was the fullest disclosure of the facts, it must be assumed that Ohlson knew what he was doing when he assented to this commission being paid. The commission was fairly earned from the vendor; there is no question here of pressure or undue influence. In *Copp* v. *Lynch* (3), which was relied on by the taxing master, there was no knowledge on the part of the client that commission was being received by the solicitor. Had there been full disclosure as here, that case would have been decided differently. The decision appealed from is right and should be affirmed.

Wilkinson, in reply. It was the duty of the solicitor to advise his client as to his strict legal rights, and there is nothing to shew that Ohlson knew that he could refuse to allow his solicitor to retain any commission; even assuming that Ohlson knew what he was doing, he was not bound unless he had independent advice: *Barron* v. *Willis*. (4) The fact that the benefit obtained by the solicitors was an indirect benefit, not derived from Ohlson, makes no difference.

Cur. adv. vult.

(1) [1898] 2 Ch. 153.
(2) (1878) 3 App. Cas. 1218.
(3) (1882) 26 Sol. J. 348.
(4) [1900] 2 Ch. 135, 137.

March 20. VAUGHAN WILLIAMS L.J., after shortly stating the facts, continued:—It seems plain that these solicitors were attempting to serve two masters, and that one master, Mr. Ohlson, knew this, and that the other, Mr. Elliot, did not. I think that, if the truth had been known, Mr. Elliot would never have paid the 210*l.* into court. I think that the claim on Mr. Elliot ought never to have been made. I do not see how we can order money to be paid by Messrs. Haslam & Evans to Mr. Ohlson's executors which Messrs. Haslam & Evans wrongfully obtained, to the knowledge of Mr. Ohlson, from Mr. Elliot. But, even putting aside the consideration that the money was wrongfully obtained, and that in pari delicto potior est conditio possidentis, I further think that the executors of Mr. Ohlson are not entitled to treat the 210*l.* paid by Mr. Elliot to Messrs. Haslam & Evans as money received to Mr. Ohlson's use, or in any way to surcharge them. There is no ground for saying that the 210*l.* was a secret profit. The only other possible view which, in my judgment, could support the contention that Mr. Ohlson's executors are entitled to have the benefit of this payment is, that the 210*l.* was something put on the price by the vendor, and that Mr. Ohlson, in allowing Mr. Haslam to keep this sum, was making a gift to his solicitor, which he was not entitled to keep, having regard to his position as solicitor for the donor. I do not think on the evidence that it was a gift. It was a payment for a service. Mr. Ohlson in effect said to his solicitor, "Keep the sum that the vendor puts on the price to pay your commission, but you must, in consideration of this, serve me and not him." The case, therefore, does not fall within *O'Brien* v. *Lewis*. (1) The appeal must be dismissed, but, I think, without costs.

STIRLING L.J. All transactions between solicitor and client, which result in the solicitor's obtaining a benefit for himself, are subjected by Courts of law to strict scrutiny, when called in question by the client, and are treated as imposing obligations on the solicitor of greater or less stringency. In some cases the obligation goes so far as almost to bind the solicitor

(1) 32 L. J. (Ch.) 569.

C. A. 1902 HASLAM & HIER-EVANS, *In re.* Stirling L.J.

to abstain altogether from a transaction of the kind. Thus a solicitor may not accept from his client, while the relation of solicitor and client exists, remuneration for his professional services beyond that to which he is legally entitled. Of the application of this rule *O'Brien* v. *Lewis* (1) is a striking example. In the great majority of cases, however, the law does not exact so much. A solicitor may, for example, purchase from his client, but there is imposed on him the burden of proving that his client was fully informed, and duly and honestly advised, and that the price was just. See the judgment of Turner L.J. in *Holman* v. *Loynes*. (2) In *Edwards* v. *Meyrick* (3) (a case of purchase by a solicitor) Wigram V.-C. says: "The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand," and this view of the law is approved by Turner L.J. in *Holman* v. *Loynes* (2), and is in accordance with subsequent decisions. Wigram V.-C. in *Edwards* v. *Meyrick* (3) went on to point out how the appropriate duty which falls on the solicitor depends on the special circumstances of each individual case. His concluding remarks are these: "The nature of the proof, therefore, which the Court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendency or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing." It thus appears that, in the class of cases of which *Edwards* v. *Meyrick* (3) is a type, it is necessary that the solicitor should establish that he and his client were "substantially at arm's length and on an equal footing."

(1) 32 L. J. (Ch.) 569. (2) (1854) 4 D. M. & G. 270, 284.
(3) (1842) 2 Hare, 60, 69, 70.

In the present case the solicitors were retained by Mr. Ohlson, now deceased, to act for him in negotiating and carrying into effect the purchase of certain patent rights. The solicitors had obtained from the vendor a commission note, under which they were entitled to a certain commission in the event of their introducing to him a purchaser. This commission note was handed to Mr. Ohlson, and remained in his possession for some days previously to the contract of sale being entered into. The purchase was carried into effect, and the solicitors, with Mr. Ohlson's knowledge, recovered payment of the commission from the vendor. After this Mr. Ohlson died, and subsequently to his death the solicitors delivered a bill of costs to his executors, who have procured an order for its taxation. In the course of the taxation the executors have sought to charge the solicitors with the amount of the commission received by them, and the question is whether they are entitled so to do. I do not think that the rule applied in *O'Brien* v. *Lewis* (1) governs this case, for the commission was paid, not by the client, but by the vendor as remuneration for services rendered to him. On the other hand, I think that the less stringent rule discussed in *Edwards* v. *Meyrick* (2) does apply. I am fortified in this opinion by what is laid down by Turner L.J. in *Lyddon* v. *Moss* (3), with reference to an agreement by a client to allow his solicitor interest upon his bill of costs. The learned judge says (4): "Every such agreement is a bargain between the solicitor and the client, and can be supported only under the same circumstances as would support any other bargain between them. It is the bounden duty of a solicitor, before he enters into any such bargain with his client, to inform the client that the law allows of no such charge of interest, and that although he may decline to conduct the client's business without such an allowance, others, of equal ability, may be found who will conduct it upon the scale of allowances which is sanctioned by the law." The learned judge holds that interest on costs, although in a sense an addition to remuneration allowed by law, may be bargained for,

(1) 32 L. J. (Ch.) 569.
(2) 2 Hare, 60.
(3) (1859) 4 De G. & J. 104.
(4) Ibid. 130–1.

C. A. 1902 — HASLAM & HIER-EVANS, *In re.* — Stirling L.J.

but only subject to the like obligations on the part of the solicitor as any other bargain. I think, therefore, that in the present case the solicitors were under an obligation to give the client full information, and to advise him, if and so far as necessary, with reference to the commission note. The solicitors have established that they did give him full information; but, if legal advice was necessary to be given by them, there is no evidence of their having given it. If the solicitors had not made full disclosure, it is quite clear that the client would have been entitled to recover the amount from them; but no case has been cited to shew that a person can recover a profit received, with full knowledge on his part, by one standing in a fiduciary position towards him. It was unnecessary that the solicitors should inform the client that they would have been liable to him if they had not given him the information which they did, and, so far as I have as yet stated the facts, more was not required of them. It appears, however, that the solicitors not only received the commission which they received from the vendor with the knowledge of their client, but bargained with him that they should be allowed what is termed a reasonable commission (of which the suggested amount was 250*l.*) from himself in the event of their not being able to recover a commission from the vendor. To that state of things the more stringent rule to which I have referred does appear to me to apply. In *O'Brien* v. *Lewis* (1) the promise of additional remuneration appears to have been volunteered by the client, and Lord Westbury says that the solicitors ought to have said that they could accept no such thing, and that it was the bounden duty of the solicitors not to accept such a promise. Still more was it the duty of the solicitors in the present case to abstain from making such a bargain as they did. Since the date of the decision in *O'Brien* v. *Lewis* (1) the Attorneys and Solicitors Act, 1870, has been passed, and solicitors may make bargains with their clients as to their remuneration, which were previously inadmissible; but such agreements are fenced by safeguards imposed by the Legislature, which have not been observed by the solicitors in the present case,

(1) 32 L. J. (Ch.) 569.

nor were they brought to the notice of the client. It is quite true that the bargain has not been enforced, and, in the events which happened, came to nothing; but the fact of its existence affords some evidence that the solicitors and their client were not dealing at arm's length and on an equal footing. It appears to me, however, that in these circumstances the remedy of the client is not to recover the amount of the commission paid to the solicitors by the vendor, but to set aside the transaction between himself and his solicitors. That relief cannot, however, be given in the present proceedings. I think, therefore, that the appeal ought to be dismissed. But I consider it my duty to express my great regret that solicitors should have made a bargain, which was not merely improper in the eye of the law, but which placed them in a position in which it was scarcely possible for them to fulfil the duties which they had undertaken to both vendor and purchaser of the patent. Although I have rested my judgment on the grounds which I have stated, it must not be understood that I disagree with what has been said by Vaughan Williams L.J.

COZENS-HARDY L.J. said that he had had an opportunity of reading the judgment of Vaughan Williams L.J., which so entirely expressed his own view that he would not add anything.

Solicitors: *Greenop & Son; Haslam & Hier-Evans.*

W. C. D.

C. A.
1902
March 19, 20.

SMITH *v.* KERR.

[1899 S. 1666.]

Charity—Charitable Purpose—Inn of Chancery—School of Learning—Study of the Law—Failure of Object—Disposition of Property.

The Society of Clifford's Inn was one of the Inns of Chancery which were established to provide for the legal education of students of the law. In the year 1618 by an indenture of feoffment the messuage and premises occupied by the society were assured to certain members thereof as trustees, in consideration of the payment of a sum of money, and the reservation of certain rents. The indenture declared that the intention of the grantors was that the messuage commonly called Clifford's Inn, which was stated to have been for many years used and employed as an Inn of Chancery for the study and practice of the common laws of the realm, and to have been governed to the good of the Commonwealth and the honour of the grantors and their ancestors, "shall and may hereafter continue to be employed as an Inn of Chancery for the furtherance of the practisers and students of the Common Law of the Realm as aforesaid," and that the society should from thenceforth be assured of a certain estate therein, and the operative part of the deed declared that the true intent and meaning thereof and of the parties thereto was that "Clifford's Inn shall for ever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of the society and for the benefit of the Commonwealth as aforesaid and not otherwise." The property had long been dealt with by the society as its own, and for its own purposes, and the surviving members contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, to be divided and disposed of as they might think fit :—

Held, that the property vested in the present trustees was held by them upon trust for charitable purposes.

Judgment of Cozens-Hardy J., [1900] 2 Ch. 511, affirmed.

APPEAL from the judgment of Cozens-Hardy J. (1)

The subject-matter of this action was the property known as Clifford's Inn. The Society of Clifford's Inn was one of the Inns of Chancery, and the plaintiffs were five of the existing sixteen members, and the defendants were the other members and the Attorney-General. The question raised was whether the trustees of the society held the property subject to or affected by any charitable trust.

(1) [1900] 2 Ch. 511.

The facts of the case are set out at length in the report of the case below.

Stated shortly, they were that the Society of Clifford's Inn was one of the Inns of Chancery, and that in 1618 the property that the society then occupied was granted to certain persons as trustees in consideration of a payment of 600*l.* and of certain rents reserved. The object of the grant was stated in the deed of conveyance to be that the premises should be continued and employed as an Inn of Chancery.

The learned judge held that so much of the property comprised in the deed of 1618 as was vested in the existing trustees was subject to a trust for charitable purposes.

Mr. George Booth, one of the defendants, appealed, and notice of the appeal was given to the plaintiffs and the other defendants, of whom none appeared at the hearing of the appeal. Notice was also given to the Attorney-General.

The appeal was heard on March 19, 1902.

Neville, K.C., and *Lyttelton Chubb*, for the defendant Booth, in support of the appeal.

Sir R. B. Finlay, A.-G. (with him *Sir E. H. Carson, S.-G., R. J. Parker*, and *W. P. Baildon*), for the Attorney-General, was not called on.

March 20. COLLINS M.R. This is an appeal from the decision of Cozens-Hardy J., as he then was, who stated the point that arose for discussion in the first words of his judgment: "This action is brought to determine whether the property known as Clifford's Inn is subject to or affected by any charitable trust, or whether it is held by the trustees in whom the legal estate is vested as private property for the individual members of the Society of Clifford's Inn for their own personal benefit, to be divided and disposed of as they may think fit." He decided that it is affected by a charitable trust.

Though Clifford's Inn is a very ancient foundation, we are not left to vague speculation, derived from such hints as can be collected from early references to it, because we have in

C. A. 1902 SMITH v. KERR. Collins M.R.

comparatively modern times, as a basis of the whole discussion before us, the deed of March 29, 1618, under which Clifford's Inn acquired the property. On the face of that deed the purpose for which it was entered into is distinctly recited, and when we come to the operative part of the deed we find that the same purpose is provided for in express terms.

The material words are these. After naming the parties, Lord Cumberland and Lord Clifford being the two grantors, it witnessed that the grantors "having an honourable intent and care that the capital messuage commonly called Clifford's Inn before mentioned, with the appurtenances thereto belonging being the ancient inheritance of the said Earl and Lord Clifford and of their ancestors, and which hath been for many years heretofore by the allowance of the said Earl and his ancestors the Earls of Cumberland and Lord Cliffords used and employed as an Inn of Chancery for the furtherance of the study and practice of the Common Laws of this His Majesty's Realm of England, and during all that time hath been ordered and governed by the Principal and Rules of the said House for the time being in very good sort and with great discretion both to the good of the Commonwealth and to the honour of the said Earl and Lord Clifford and their ancestors, may now upon the humble suit and earnest desire of the said Principal and Rules and others the Practisers and students of the said Society be assured estated and settled as" —I think that means "so as"—"the same shall and may for ever hereafter continue and be employed as an Inn of Chancery for the furtherance of the Practisers and Students of the Common Laws of this Realm as aforesaid And that the Principal Rules and other the gentlemen of the said Society may from henceforth be assured of a certain estate therein Do principally for that purpose intent and consideration and for and in consideration of the sum of 600*l.* to them by"—here follow the names of thirteen persons—"for and on behalf of themselves and the rest of the gentlemen of the same Society of Clifford's Inn aforesaid at or before the sealing and delivery of these presents well and truly satisfied contented and paid" —here follows a receipt and a provision for a common recovery

to the uses, intents, and purposes thereafter in the deed mentioned, and a grant of the premises, with certain exceptions, to be held by two trustees who are named and their heirs for ever to the only and proper use and behoof of the trustees named and of their heirs for ever—"To the intent and purpose aforesaid To be holden of the Chief Lord and Lords of the Fee and Fees thereof by the rents and services heretofore due and of right accustomed and yielding and paying therefore yearly for ever unto the said Francis Earl of Cumberland and Henry Lord Clifford their heirs and assigns the yearly rent of four pounds." Then it goes on: "After the said recovery and recoveries fine and fines or any or either of them shall be had acknowledged and suffered executed entered and recorded as aforesaid to the use and behoof of" the thirteen gentlemen first named "and of their heirs for ever according to the intent and true meaning of the present indenture and to the intent that the said Earl and Lord Clifford their heirs and assigns shall and may for ever hereafter levy receive perceive and take up the said yearly rent of four pounds." Then it goes on: "And it is further agreed by and between the said parties to these presents and the true intent and meaning hereof and of all the said parties is that the said capital messuage now called by the name of Clifford's Inn shall for ever hereafter retain and keep the same usual and ancient name of Clifford's Inn, and shall for ever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of the Society and for the benefit of the Commonwealth as aforesaid and not otherwise, nor to any other use intent or purpose." Then there are provisions for the trustees being continually renewed for ever.

Mr. Neville contended that Clifford's Inn was a voluntary society of gentlemen associated simply for their own benefit, and that, as such, it was not a charitable institution, and he said, that that being its purpose and its practice at the time of this grant, all that the grant did was, so to speak, to facilitate and perpetuate that which they were already doing, and to leave matters as they then stood, except that the grant gave to the society a more continued existence, and that it followed

C. A. 1902 SMITH v. KERR. Collins M.R.

that there was no element of charitable trust in the matter. Again we are not left to speculation, nor have we to look for obscure hints from remote times, because it so happens that we have a most authoritative contemporary record of the actual function which Clifford's Inn and other Inns of the same class were fulfilling at the very time when this grant was made. That record, resting upon the authority of Lord Coke practically contemporaneous with the grant, does not stand alone, because it is preceded by another very authentic account given by Fortescue, and there is also another (all these are cited in Cozens-Hardy J.'s judgment), practically contemporaneous, by Stowe.

Of these, I take Lord Coke's as the most directly in point, because, as I have said, it is absolutely contemporary. He says this: "For the young student, which most commonly cometh from one of the Universities, for his entrance or beginning were first instituted and erected eight houses of Chancery, to learn there the elements of the law, that is to say" (inter alia) "Clifford's Inn, and each of these houses consists of forty or thereabouts." The judgment of Cozens-Hardy J., from which I am reading, goes on: "After describing the four Inns of Court and Serjeants' Inn, he adds: 'All these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others quantum inter viburna cupressus. In which Houses of Court and Chancery, the readings and other exercises of the laws therein continually used are most excellent and behooffu] for attaining to the knowledge of these laws.'"

It seems to me, therefore, clear that at that time these Inns of Chancery were schools of learning. They were fulfilling that function, and, if so, we come to this—were they charitable institutions? It is perfectly clear that the maintenance of schools of learning is a charitable purpose. It is one of those specifically named in the statute of Elizabeth, and if these Inns were existing at that time for the maintenance of schools of learning, they were charitable institutions. It is enough, if that be the nature of the practice of these Inns and the

purpose for which they existed, to stamp this property now in question with a trust if it were acquired and granted for the purpose of continuing to carry out that which the society were then engaged upon, namely, the maintenance of schools of learning. I think, therefore, that we have here, without any ambiguity, all the elements that go to make up a grant for a charitable purpose. There was some foundation undoubtedly for the contention that this was a society which made rules for its own guidance, and, it may be, for incidentally acquiring instruction by mutual arrangement and the giving and receiving instruction among themselves, so that it might be regarded possibly as an institution which had no charitable purpose underlying it, and that a grant added to that would not superadd or stamp it with a charitable purpose. But when we look to the contemporary records which the learned judge has referred to, and which I have mentioned, it is perfectly clear what the object of the society was, and what they were actually carrying out. We have had the rules of the society brought before us which have been dealt with in detail by Cozens-Hardy J., who points out the provisions for the instruction of the young students—"tyrones" as they were called in one of the extracts—provisions making it compulsory upon them to attend moots; not to instruct themselves by discussion, for in some of the rules they are under penalties if they do not attend lectures and discourses coming obviously, not from themselves, but from other persons better fitted to instruct them. Therefore there is in the rules themselves complete demonstration of the fact that there was a system of instruction arranged—not mutual interchange of their own ideas in debate, but an obligation upon them to receive and hear instructions given by competent persons. Further, we have the contemporary records, in which, in language of the highest possible commendation, the purposes which the Inns served in the advancement of learning are enlarged upon by more than one writer.

Now what is the answer to that? There has been stamped on this land and property a trust for carrying out these purposes. It is said that the grant of 1618 was not a gift at all, because there was consideration given for it which it is said

C. A. 1902 SMITH v. KERR. Collins M.R.

was the full value of the land at that time. I do not feel at all sure about that, and there is no evidence upon it. The answer to the suggestion is clear. It does not matter where the fund comes from, or how the fund has been raised. The real question is, What is the purpose to which it is applied? This subject is discussed at length in *Attorney-General* v. *Eastlake* (1), and the governing principle is stated in the head-note: "The question, whether funds are dedicated to a charitable use within the statute 43 Eliz., c. 4, depends, not on the source from which the funds are derived, but on the purpose to which they are to be applied." Here is a public purpose for which it may be the members of the Inn themselves have raised a contribution. But they themselves and the grantors between them joined in acquiring and granting this land for a charitable purpose, and therefore it becomes fixed with a trust for a charitable purpose, just as much as if it had been granted wholly and voluntarily by the grantors without any consideration received by them. It was granted for a charitable purpose; it bears on the face of the grant itself an assertion that that is the primary purpose, and that primary purpose is not defeated because there are incident thereto certain emoluments and advantages received by the people who have to carry out the trust.

It seems to me, therefore, that this is really a simple case. We have all the elements before us which are necessary to create a charitable trust, and it was effectually carried out by the document to which I have referred.

It has been said that there have been other Inns which have now ceased to exist, and that when they ceased to exist this point was not taken, and the societies have distributed the property in specie among themselves for their own profit and advantage. That may be the case, but as to that we know nothing of what the particular terms were in those cases, or what was the evidence as to the terms upon which those societies existed, and, therefore, it may well be that it was not thought worth the while of those responsible for these matters to take any part in the investigation of how those properties

(1) (1853) 11 Hare, 205.

were disposed of. The fact, if it be one, throws no light upon this case, in which the element of a charitable trust, as I have already said, exists clearly and beyond controversy. In my opinion there can be no doubt that this property was impressed with a charitable trust, and that the decision appealed from was right and ought to be affirmed.

ROMER L.J. I have practically nothing to add to what has been said by the Master of the Rolls and by Cozens-Hardy J. Having regard to the terms of the deed of March 29, 1618, and to the nature and use of this Inn of Chancery at the date of that deed, as shewn by the terms of the deed itself, and by the records of the Inn, and also having regard to the statements made at and about the period concerning the Inns of Chancery by Sir John Fortescue, Lord Coke, and Stowe, and to the various orders and regulations made from time to time concerning or affecting these Inns, I cannot doubt that the hereditaments known as Clifford's Inn were conveyed upon trusts affecting them which were of such a public and general character as to be charitable within the provision of the statute of Elizabeth. Indeed, I think that the trusts were for a purpose falling within the very language of that statute. One of the charitable purposes mentioned in the statute is "the maintenance of schools of learning." The trusts in the case before us were for the maintenance of schools of learning, namely, the learning of the law.

I agree, therefore, in thinking that the appeal fails.

MATHEW L.J. I agree that the appeal must be dismissed.

The case for the plaintiff is that Clifford's Inn was a voluntary association formed for the benefit of the members and for social and convivial purposes. For the Attorney-General it was contended that the association had been constituted for the prosecution of the study of the law, and, therefore, that its property was impressed with a trust, for what was admitted to be a charitable purpose.

The history of the institution of the Inns of Court and Inns of Chancery is set forth in Dugdale's Origines (see

C. A. 1902 SMITH v. KERR. Mathew L.J.

chapters 8 and 55). They had their beginning in an ordinance and Commission issued by King Edward I. in 1290 at the time when the clergy were forbidden by the canons from taking part as advocates in civil suits. It had become necessary in the interest of the public to obtain the assistance of laymen who were trained lawyers and who were competent to take the part of their clerical predecessors in conducting the business of the Court of Common Bench, which was then permanently settled at Westminster. The Commission required the Chief Justice of the Common Bench and his fellow justices to bring together from the provinces men "of the best and most apt for their learning and skill," who should be near the Court at Westminster. Under the Commission, and to fulfil its purpose, the Inns of Court and Inns of Chancery were established to provide for the legal education of students. The Inns of Chancery were affiliated with the Inns of Court and afforded instruction, as Sir J. Fortescue says, in "the nature of original and judicial writs, which are the very first principles of the law." After a short stay in the Inn of Chancery the student desirous of practising at the bar passed on to one of the four Inns of Court.

Clifford's Inn was an Inn of Chancery connected with the Inner Temple, and the course of study in this and the other Inns of Chancery is described in the works of authority referred to by the Master of the Rolls, and was mainly by means of readings and moots, which the members of the governing body would seem to have provided for in turn.

The true character of Clifford's Inn is plainly stated in the deed of 1618, which made no apparent change in its constitution. It was a place of learning before, and continued to be a place of learning afterwards. The fact that in later times different methods of acquiring a knowledge of the law were adopted does not divest Clifford's Inn of its character of a trust estate, or enable the plaintiffs to say that it has become the private property of its members. The counsel for the appellant were driven to contend that immediately after the deed of 1618 the governing body might have disposed of the Inn and divided the purchase-money. But this would be to neglect the

language of the deed, and to disregard the clear statement of the purpose for which it was executed by the grantors and grantees.

C. A. 1902 SMITH v. KERR.

Solicitors: *George Booth; Solicitor for the Treasury.*

A. M.

In re "UNEEDA" TRADE-MARK.

C. A. 1902 March 20.

Trade-mark—Invented Word—Non-descriptive Word—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

The word "Uneeda," being a mere misspelt combination of the English words "You need a," is not an "invented word" within the meaning of s. 10 of the Patents, Designs, and Trade Marks Act, 1888. Moreover, it is descriptive of the character or quality of the goods: and on both these grounds it is not the proper subject of registration as a trade-mark.

Decision of Cozens-Hardy J., [1901] 1 Ch. 550, affirmed.

APPEAL from a decision of Cozens-Hardy J. (1)

A motion was made on behalf of the National Biscuit Company of Jersey City, in the United States of America, that the Comptroller-General of Patents, Designs, and Trade Marks might be directed to proceed with an application by the company for registration of a trade-mark consisting of the word "Uneeda" in respect of biscuits and other things.

Registration had been refused on the ground that the trade-mark was not an invented word within the meaning of s. 10 of the Patents, Designs, and Trade Marks Act, 1888.

The application was refused.

The applicants appealed.

Moulton, K.C., and *E. F. Lever*, for the applicants. There is no disadvantage in the registration of an effective trade-mark unless some one will be prejudiced thereby, and that is a matter that can be guarded against by disclaimer. No one can be prejudiced by the registration of this word, and it is an unnecessary restriction to say that no word is to be used as a trade-mark if it can be resolved into elements which are each of

(1) [1901] 1 Ch. 550.

C. A. 1902 "UNEEDA" TRADE-MARK, *In re.*

them words. The suggested trade-mark does not relate to the quality of the goods. The invention in connection with the trade-mark consists first in selecting the materials and then in combining them. The object of the Acts was that trade-marks should be registered for the prevention of disputes, and it is against the policy of the Acts to impose unnecessary restrictions on registration.

[They cited *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks.* (1)]

Sir R. B. Finlay, A.-G. (*R. J. Parker* with him), for the comptroller, was not called on.

COLLINS M.R. I agree with the conclusion at which the learned judge who tried this case arrived, and I adopt the reasons that he gave for his judgment, which seem to me to exhaust all that can be said on the matter, and to make it unnecessary for me to add anything.

The appeal must be dismissed.

ROMER L.J. I agree. Speaking for myself, I think the Courts of first instance, and also the Courts of Appeal, have been unnecessarily hard upon traders who have sought to register trade-marks. I should not myself be inclined to be astute to find objections. In this case, however, I think the objection is obvious, and I agree with the conclusion arrived at by the learned judge.

MATHEW L.J. I am of the same opinion, and I will only add that it seems to me that there is no element of invention about this trade-mark.

Solicitors for applicants: *Burn & Berridge.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

(1) [1898] A. C. 571.

A. M.

CHAPMAN *v.* BROWNE.

C. A.
1902
Feb. 27, 28; *March* 4, 26.

[1899 C. 3961.]

Breach of Trust—Improper Investment by Trustees—Power to invest on Real Security in Ireland—Puisne Mortgage—Relief under Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The trustees of a marriage settlement were thereby directed to invest the trust funds in (among other alternative modes of investment) Government securities of India, or on freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland, and were empowered to vary investments with the consent of the husband and wife during their joint lives. Lands in Ireland, which were already subject to mortgages for 4700*l.* and 2460*l.*, were further mortgaged for a sum of 17,900*l.*, which was by subsequent payments reduced to 12,150*l.* There were three submortgages of the last-mentioned mortgage for the sums of 4000*l.*, 2153*l.*, and 5000*l.* respectively. The trustees of the marriage settlement, without the consent of the wife, sold out India stock forming part of the trust funds, and invested the proceeds thereof on a transfer of the third submortgage for 5000*l.* They took no legal advice as to the propriety of this investment before making it. In an action against the surviving trustee of the settlement for breach of trust:—

Held, without deciding whether a puisne mortgage on land in Ireland is of necessity and in all cases an improper investment for trust funds, that an investment of such a nature as the trustees had made in the case before the Court was a breach of trust, and that, under the circumstances, the defendant ought not to be relieved from liability in respect thereof under the Judicial Trustees Act, 1896, s. 3.

APPEAL from a judgment of Cozens-Hardy J. as after mentioned.

The action was brought by the Rev. Dawson Francis Chapman and Thomasina Chapman, his wife, against William Denis Browne, the surviving trustee of a settlement made on the marriage of the plaintiffs, claiming a declaration that a certain investment of a sum of 5000*l.*, forming part of the funds subject to the trusts of the settlement, was a breach of trust, and that the defendant was liable to replace the same, and make good the breach of trust. The defendant in his statement of defence (inter alia) claimed the benefit of the Judicial Trustees Act, 1896.

By the settlement, which was dated September 20, 1866, a

C. A. 1902 CHAPMAN v. BROWNE.

sum of 5000*l.*, covenanted to be paid to the defendant and Thomas Wallace, since deceased, the trustees of the settlement, by the father of the female plaintiff as therein mentioned, was settled upon the trusts hereinafter mentioned. The settlement was executed in Ireland. The parties to it were Irish, the male plaintiff being, however, the incumbent of a benefice at Preston, in Lancashire. Under the trusts of the settlement the trustees were directed to invest the said sum of 5000*l.*, when received, "in any of the public stocks, or funds, or Government securities of the United Kingdom, or India, or any colony or dependency of the United Kingdom, or upon freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland," or in certain other investments therein specified, and were empowered, with the consent of the plaintiffs during their joint lives, and of the survivor of them during his or her life, and, after the death of such survivor, at the discretion of the trustees, from time to time to vary or transpose such stocks, funds, shares, and securities into or for others of the same or a like nature, and were directed to pay the income of the trust funds representing the 5000*l.* to the male plaintiff during the joint lives of the plaintiffs, and, after the death of one of the plaintiffs, to pay the whole of the income of the trust funds to the survivor of them during his or her life, and, after the death of such survivor, to hold the trust funds upon certain trusts for the issue of the intended marriage and other trusts as therein mentioned. The sum of 5000*l.* was received by the trustees and invested in India stock, but that stock was subsequently sold by the trustees, and the proceeds thereof were in 1871 invested by the trustees on the security of a submortgage of a puisne mortgage of land in Ireland belonging to one Richard John Verschoyle as after mentioned.

It appeared that lands in the county of Sligo in Ireland, upon which there were two mortgages for the sums of 4700*l.* and 2460*l.* respectively, were in 1864 purchased by Richard John Verschoyle, and duly conveyed to him, subject to the before-mentioned mortgages, by conveyances dated August 15, 1864. By an indenture also dated August 15, 1864, Richard John Verschoyle, by way of mortgage to secure repayment of

the sum of 17,900*l.* lent to him by Richard Olpherts, conveyed the before-mentioned lands, subject to the mortgages as aforesaid, to Francis M. Olpherts, as trustee for Richard Olpherts, his heirs and assigns. By indenture dated August 23, 1864, by way of sub-mortgage to secure repayment of the sum of 4000*l.* advanced to Richard Olpherts by William Lee and Arthur Barlow, Richard Olpherts assigned to William Lee and Arthur Barlow the sum of 17,900*l.* secured by the mortgage of August 15, 1864, and Francis M. Olpherts, by direction of Richard Olpherts, conveyed the before-mentioned lands to William Lee and Arthur Barlow, their heirs and assigns. The amount of the mortgage debt due on the mortgage of August 15, 1864, was subsequently reduced by payments made by Richard John Verschoyle to Richard Olpherts, with the consent of the sub-mortgagees, to a sum of 12,150*l.* or thereabouts. By indenture dated February 23, 1867, by way of sub-mortgage to secure repayment of a further sum of 2153*l.* advanced to Richard Olpherts by William Lee and Arthur Barlow, Richard Olpherts assigned the sum remaining due upon the mortgage of August 15, 1864, to William Lee and Arthur Barlow, and Francis M. Olpherts, by direction of Richard Olpherts, conveyed the before-mentioned lands to William Lee and Arthur Barlow, their heirs and assigns. By indenture dated December 1, 1869, by way of sub-mortgage to secure repayment of the sum of 5000*l.* advanced to Richard Olpherts by James William Fitzmayer, Richard Olpherts assigned to James William Fitzmayer the sum remaining due on the mortgage of August 15, 1864, and Francis M. Olpherts, by direction of Richard Olpherts, conveyed the before-mentioned lands to James William Fitzmayer, his heirs and assigns. By an indenture dated August 12, 1871, to which Richard John Verschoyle, James William Fitzmayer, Richard Olpherts, Francis M. Olpherts, and the defendant and his co-trustee were parties (being a transfer of the sub-mortgage of December 1, 1869), after reciting (inter alia) that Richard John Verschoyle was minded to pay to James William Fitzmayer the said sum of 5000*l.*, and with a view thereto had applied to the defendant and his co-trustee to advance the same to him,

C. A. 1902 CHAPMAN v. BROWNE.

and that Richard John Verschoyle had paid to Richard Olpherts the amount of the balance due on the mortgage of August 15, 1864, over and above the before-mentioned three sums of 4000*l.*, 2153*l.*, and 5000*l.*, and had requested him to release the before-mentioned lands therefrom, it was witnessed that, in consideration of the sum of 5000*l.* paid by the defendant and his co-trustee, at the request of Richard John Verschoyle and Richard Olpherts, to James William Fitzmayer, the latter, at the request of Richard Olpherts, assigned to the defendant and his co-trustee the sum of 5000*l.* owing to him upon the security of the sub-mortgage of December 1, 1869, with the benefit of all securities for the same, absolutely; and it was further witnessed that James William Fitzmayer assigned to the defendant and his co-trustee the sum remaining due on the mortgage of August 15, 1864, subject to the equity of redemption then subsisting under the indenture of August 15, 1864; and it was further witnessed that James William Fitzmayer conveyed the before-mentioned lands to the defendant and his co-trustee, their heirs and assigns, subject to the equity of redemption subsisting therein under the indenture of December 1, 1869, and under the indenture of August 15, 1864, or either of them respectively; and it was further witnessed that Richard Olpherts, by the direction of Richard John Verschoyle, and Francis M. Olpherts, by the direction of Richard Olpherts, conveyed to the defendant and his co-trustee, their heirs and assigns, the equity of redemption of Richard Olpherts then subsisting under the indenture of December 1, 1869, in the before-mentioned lands, and all the estate and interest of Richard Olpherts in the same or in the moneys secured by the said indenture under or by virtue of the mortgage of August 15, 1864, but subject to the equity of redemption subsisting therein under the indenture of August 15, 1864; and Richard John Verschoyle covenanted with Richard Olpherts to indemnify him against the said mortgage debts of 4000*l.*, 2153*l.*, and 5000*l.*, and the interest thereon. By an indenture dated August 31, 1871, Richard John Verschoyle conveyed the before-mentioned lands to the defendant and his co-trustee, their heirs and assigns, by way of mortgage to secure payment of

the said sum of 5000*l.* and interest, and covenanted with them personally for the payment of the same. By the last-mentioned indenture it was provided that, if the interest on the said sum of 5000*l.* was regularly paid by the said Richard John Verschoyle, and he performed all the covenants therein contained on his part to be performed, then the trustees would not call in the said principal sum of 5000*l.* or any part thereof before August 14, 1875. The advance of 5000*l.* by the defendant and his co-trustee upon the security of the two last-mentioned indentures was the investment complained of as a breach of trust by the plaintiffs. At the time of the making of the investment the greater part of the estate was in the occupation of the owner, Verschoyle, who used to let the grazing upon it. (1) It appeared that the consent of the female plaintiff had not been obtained to the variation of investment by sale of the India stock and the investment of the proceeds as before mentioned, and the learned judge found as a fact that she had not consented to it. As will be seen from the judgment, the Court of Appeal came to the conclusion on the evidence that the trustees had not taken any legal advice as to the propriety of the investment, though they had employed a solicitor, who also acted as solicitor to the mortgagor, Verschoyle, to carry out the transaction, and a counsel to advise as to the form in which the security should be taken.

No interest had been paid on the sum of 5000*l.* since the year 1888, and in 1894 the mortgaged property was put up for sale by order of the Land Judge of the Chancery Division of

(1) One question raised in the action, upon which Cozens-Hardy J. took a view unfavourable to the defendant, was whether, having regard to the nature of the property and its value at the time of the investment, which was estimated by an expert witness for the defendant as being 33,000*l.*, and to the amount of the charges then outstanding upon it, there was a sufficient margin of value to make the security one upon which it was proper or prudent to invest trust funds. The facts with regard to this question are not stated, because, as will be seen from the judgment, the Court thought it unnecessary to deal with it, being of opinion that the character of the security was such as to render the investment a breach of trust independently of that question.

C. A. 1902 — CHAPMAN v. BROWNE.

the High Court of Justice in Ireland, but no purchaser was found for it, and it remained unsold.

The defendant and his co-trustee had recovered judgment against Verschoyle in an action on the covenant by him contained in the mortgage deed of August 31, 1871, but only 233*l.* 11*s.* 6*d.* had been recovered under the judgment. After deducting the expenses of recovering the same, there remained a sum of 75*l.* 1*s.*, which was all that the trustees had been able to recover out of the sum of 5000*l.* invested as aforesaid. This sum of 75*l.* 1*s.* had been invested in New Consols in accordance with the trusts of the settlement.

Cozens-Hardy J. made a declaration that the investment as before mentioned was a breach of trust, declined to grant relief to the defendant under the Judicial Trustees Act, 1896, and ordered that the defendant should lodge in Court the sum of 4924*l.* 19*s.* to be dealt with as directed by the order. (1)

The defendant appealed. The appeal came on for hearing on February 27, 1902.

Eve, K.C., and *Stephen Ronan, K.C.* (of the Irish Bar), for the defendant. It is not necessarily a breach of trust according to the law and practice in Ireland for trustees authorized to invest on real security in Ireland to invest on a puisne mortgage, if the investment is in other respects unobjectionable: *Smithwick* v. *Smithwick* (2); *Crampton* v. *Walker*. (3) The settlement in this case must be considered an Irish settlement, that is to say a settlement with regard to which it may be inferred that the parties contemplated that Irish law and practice should apply. It was executed in Ireland, the parties to it were all Irish, and the only fact which can be pointed to as indicating that they contemplated

(1) It is not material for the purposes of this report to state the effect of the order further than as above. The circumstances of the case involved certain complications with regard to the effect of the Statute of Limitations on the interest of the male plaintiff, and to the possibility of further sums being realized on the mortgage securities, which necessitated somewhat special provisions in the order, but these matters have no bearing on the points involved in the appeal.

(2) (1861) 12 Ir. Ch. Rep. 181.

(3) (1893) 31 L. R. Ir. 437.

the application of English law is that the husband was beneficed in England. It is submitted that, of itself, that fact is not sufficient to raise the inference that the application of English law was contemplated.

The operation of the Acts relating to land in Ireland is such as to remove the risks and objections incidental to a second mortgage in England. Those risks and objections depend on the fact that the legal estate is outstanding, and the holder of a second mortgage is exposed to the risks of foreclosure by the first mortgagee, unless he is prepared to redeem, and of tacking. A second mortgagee in Ireland is in many respects really in a better position than a first mortgagee is in England. The effect of the Registration Acts in Ireland, which began with 6 Anne, c. 2, and the Landed Estates Court (Ireland) Act, 1858 (21 & 22 Vict. c. 72), and subsequent Acts, is that a second mortgagee is really not prejudiced by not having the legal estate. The effect of registration is to prevent the first mortgagee from tacking, and there is no such thing really as foreclosure in Ireland, the remedy of a mortgagee being by sale. The policy of the Land Acts in Ireland is to put all incumbrancers on the land, subject to their respective priorities, on an equality. A puisne incumbrancer in Ireland is not involved in the necessity of finding money, in order to redeem a prior incumbrance; he can apply to the Court for a sale of the land by order of the Court, and on such a sale the Court will act as a trustee for all parties interested, and apply the proceeds of sale to the incumbrances on the land according to their respective priorities. A conditional order for sale is made ex parte on the petition of any incumbrancer, and is served on all other parties interested, and they have a certain time within which to shew cause against it: see Landed Estates Court (Ireland) Act, 1858, ss. 43–53. When the order for sale is made absolute, it operates as a conversion of the estate into money, and an absolutely safe title is given to the purchaser under it. As to the effect of an order for sale, see *In re Nixon's Estate* (1) and *In re Colclough*. (2) *In re Buswell's Estate* (3) is no authority

(1) (1874) Ir. R. 9 Eq. 7. (2) (1858) 8 Ir. Ch. Rep. 330.
(3) (1880) 5 L. R. Ir. 349.

C. A. 1902 CHAPMAN v. BROWNE.

that a prior mortgagee can prevent a sale at the instance of a subsequent mortgagee. In that case the petitioner for the sale was the mortgagor, and the Court stayed the proceedings to give the mortgagees, who were desirous of selling out of Court, an opportunity of so doing. In no case has a similar order been made in favour of a prior incumbrancer as against a subsequent incumbrancer desiring an order for sale. In Ireland, if a second mortgagee ascertains that the title-deeds are in the custody of the first mortgagee, his position is safer, by reason of the Registration Acts, so far as title is concerned, than that of a first mortgagee in England: see *In re Burke's Estate.* (1) In *Drew* v. *Earl of Norbury* (2) Pennefather B. lays it down that the true construction of the Registration Act is that all instruments, when put upon the registry, operate as if they were conveyances of the legal estate, subject to their priority, and therefore the effect of registration of a second mortgage is to prevent tacking by a first mortgagee. *Waring* v. *Waring* (3) is no authority for the proposition that there is any objection in Ireland to a second mortgage as a trust investment, for the investment there was objectionable on other grounds: see *Smithwick* v. *Smithwick.* (4) It being clear that an Irish Court would not hold an investment like this to be a breach of trust merely because it was upon a puisne mortgage, how can it be said that the Irish trustee of a settlement, all the parties to which were Irish, acted improperly or unreasonably in making an investment which would not be held by an Irish Court to be a breach of trust? If the defendant had consulted Irish counsel, or applied for the directions of the Irish Court, as to this investment, he would have been advised that there was no objection to this security on the ground of its not being a first mortgage. Is the mere accident of the trustee's coming over to England, and so bringing himself within the jurisdiction of the High Court here, to make him liable for a breach of trust, because, according to the practice in England with regard to English land, trustees are not allowed to invest on a second mortgage? Assuming that this settlement must be treated as

(1) (1881) 9 L. R. Ir. 24.
(2) (1846) 3 J. & Lat. 267, 297.
(3) (1852) 3 Ir. Ch. Rep. 331.
(4) 12 Ir. Ch. Rep. 181, 196, 197.

English, it is submitted that, even then, under the circumstances the investment cannot be treated as a breach of trust, because the reasons for holding a second mortgage inadmissible in England do not apply to land in Ireland; or, if it was a breach of trust, at any rate it was one for which the Court ought to give relief under the Judicial Trustees Act, 1896, s. 3, sub-s. 1.

Apart from the fact that the security was not a first mortgage, there is nothing to shew that at the time of the investment it was an improper one, or that the value of the security was inadequate. The learned judge in the Court below appears to have been struck with the fact that so large a portion of the land was in hand as compared with that which was let, but at that time the Landlord and Tenant (Ireland) Act, 1870, had just been passed, and the fact that the land was in hand at that date would have the effect of enhancing its value. The great struggle then was to get land in hand in order to avoid the operation of the provisions of that Act. The result of the evidence is to shew that the value of the land at the time of the investment was such as to leave a sufficient margin as security for the money invested. (1) The loss in this case has arisen not really by reason of the fact that the trustees invested on a puisne mortgage, but by reason of the general deterioration of the value of land in Ireland, and the difficulty of selling caused by the legislation relating to land in that country, and the block of business in the Landed Estates Court.

With reference to the question of consent, it is not contended for the defendant that there was any consent to the investment by the female plaintiff in such a sense as to deprive her of the right of objection to it, if it is to be regarded as a breach of trust on the ground that it was upon a puisne mortgage. The effect of the provision that the cestui que trust must consent to the variation of the mode of investment is to give him a right of placing a veto on any variation. Assuming that the investment was not a breach of trust on the ground of its being on a

(1) The facts and arguments as to the question of the value of the land at the time of the investment are not fully set forth, because the Court held this question to be under the circumstances immaterial.

C. A. 1902 CHAPMAN v. BROWNE.

puisne mortgage, then, as regards the mere question of the variation of the investment, it is submitted that a cestui que trust, who, with knowledge of the variation, has for years received the income on the new investment without objection, cannot afterwards turn round and say that the investment was a breach of trust, merely because there was no consent to the variation of the mode of investment. The wife in the present case clearly must have known that the investment had been changed, and that her husband was receiving the income from the new investment, and therefore is in the same position in this respect as if she had been receiving the income from it herself.

Hon. E. C. Macnaghten, K.C., and *O. L. Clare*, for the plaintiffs. Primâ facie it must be taken that the law of Ireland on the subject is the same as that of England; but, if there is any difference, it is submitted that the settlement in this case is an English contract, and that questions arising under it must be governed by the rules of English, and not Irish, law and practice. The defendant really admits that the settlement is English, for in his defence he claims the benefit of the Judicial Trustees Act, 1896, which does not apply to Ireland. The husband, though an Irishman, was a beneficed clergyman of the Church of England, and that raises a presumption, in the absence of any evidence to the contrary, that his domicil was English. It is an established principle in such cases that what has been called the matrimonial domicil, i.e., the place at which it may be inferred the parties contemplated that the married life would be passed, governs the question what law is applicable to the settlement: *Duncan* v. *Cannan* (1); *Corbet* v. *Waddell* (2); *Chamberlain* v. *Napier* (3); *Colliss* v. *Hector* (4); Dicey on Conflict of Laws, ed. 1896, p. 653. In cases where the laws of two countries are different, and the question is which of them applies, the circumstances must be considered with a view to determining by what general law the parties intended that the transaction should be governed, or

(1) (1854) 18 Beav. 128; (1855) 7 D. M. & G. 78.
(2) (1879) 7 R. 200.
(3) (1880) 15 Ch. D. 614.
(4) (1875) L. R. 19 Eq. 334.

rather to what general law it is just to presume that they have submitted themselves in the matter; and, though primâ facie the law of the place where the contract was made is that which the parties ought to be presumed to have adopted as the footing upon which they dealt, yet there may be circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country: see *Lloyd* v. *Guibert*. (1) In the present case the husband and wife have lived in England since 1866, and, the husband being a clergyman beneficed in England, the presumption is that they contemplated that the matrimonial residence would be in England, and therefore intended the law of England to apply to their marriage settlement.

If the settlement is to be taken to be an English settlement, it is submitted that, as a matter of construction, the investment clause giving power to invest on real securities in Ireland must be read as only giving power to invest on first mortgages. Having regard to the well-settled rule of the Court of Chancery on the subject, a power to invest on real security in England must be construed as only giving power to invest on a first mortgage, and it is submitted that, in the case of an English settlement, the same construction must be applied where there is power to invest on real security in Ireland as well as on real security in England. The suggested difficulty, that an English Court and an Irish Court might pronounce different opinions as to the propriety of an investment on a second mortgage in Ireland, really could not arise; for, assuming this to be an English settlement, an Irish Court would not pronounce an opinion on the question as a matter of Irish practice. It would be a question which it would have to decide with reference to the law and practice in England on the subject. There are no doubt two Irish cases, namely, *Smithwick* v. *Smithwick* (2) and *Crampton* v. *Walker* (3), from which it would appear that there is not quite such a hard and fast rule against investment on second mortgages in Ireland as there is

(1) (1865) L. R. 1 Q. B. 115, 120–122.
(2) 12 Ir. Ch. Rep. 181.
(3) 31 L. R. Ir. 437.

C. A. 1902 CHAPMAN v. BROWNE.

in England, because the provisions of the Registration Act there make the legal estate of somewhat less importance; but those cases afford no reason why an English Court, in construing an English settlement, should say that, contrary to what has been the rule so long applied in this country, a power to invest on real security in Ireland authorizes the trustees to invest on a puisne mortgage in that country. It is well settled that in this country trustees empowered to invest on real security are not authorized to invest on a second mortgage: Lewin on Trusts, 10th ed. 371; *Norris* v. *Wright* (1); *Drosier* v. *Brereton* (2); *Swaffield* v. *Nelson*. (3)

[ROMER L.J. I doubt whether the rule in this respect can be treated as depending on the construction of the terms of the power to invest on real securities. It appears to depend on the risks incidental to the position of a second mortgagee.]

It is submitted that the difference, if any, between the position of a second mortgagee in Ireland and that of a second mortgagee in England for this purpose is not material. Assuming that there is no foreclosure in Ireland, and that there is no risk of tacking by a first mortgagee, these are not the only matters to be considered. The real danger is that the trustees do not get the control of the security, and whether it is sold over their heads or foreclosed makes very little difference. It does not appear that a subsequent incumbrancer can stop a sale by a prior incumbrancer in Ireland. The mortgage in the present case was not a proper security for trustees to invest trust funds upon, for it is subject to all the disadvantages attributable to a second mortgage in the very strongest form. It is a security which it would be very difficult to realize. It is really a fifth mortgage on the property, and the trustees, in order to enforce it, would have to take proceedings against a number of prior incumbrancers. Such a security would not be readily saleable, and would not be a proper security for a trustee to invest on even according to the Irish law: *Waring* v. *Waring*. (4) It is said that the danger of tacking by the first mortgagee is obviated by the Irish law with regard to registration, but that

(1) (1851) 14 Beav. 291, 308.
(2) (1851) 15 Beav. 221.
(3) W. N. (1876) 255.
(4) 3 Ir. Ch. Rep. 331.

is not a material difference between the law of the two countries, for notice to the prior mortgagee gives the same protection in England. The rights of puisne incumbrancers in England appear to be now substantially the same as in Ireland. [They referred on this subject to the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 17, 21.] It is said that there is no foreclosure in Ireland, but the provisions of the Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), hardly seem consistent with that statement; for by s. 36, sub-s. 5, of that Act, among the matters assigned to the Chancery Division in Ireland, are the redemption and foreclosure of mortgages. But it is not really material whether there can be foreclosure under the Irish law or not. There is such a proceeding in Ireland as a suit for redemption, and, if such a suit be dismissed, there is practically a foreclosure. Again, one of the reasons why the English Courts have held that a second mortgage is not a proper security upon which to invest trust funds is that, in order to safeguard or realize the security, it may be necessary to redeem or secure prior incumbrances, and the trustees will probably have no funds for that purpose. A prior mortgagee having a power of sale, no doubt, is not justified in selling recklessly, but the power of sale is given to him that he may obtain satisfaction of his debt promptly, and relief will only be given to a puisne incumbrancer by way of restraining a proposed sale on the terms that he shall redeem the prior incumbrance or give some security for it. Here the trustees could not possibly have redeemed or secured the prior incumbrances. It does not appear that under the Irish law a puisne incumbrancer can prevent a prior incumbrancer from selling except on terms. Again, if a first mortgagee thinks that his money is in peril, he can go into possession of the property; and a puisne incumbrancer may find that there are arrears of interest on the first mortgage, if he seeks to realize his security. It does not appear that in this case the defendant took any pains to ascertain whether there were arrears of interest on any of the prior mortgages. Again, trustees are bound not only to look to the ultimate safety of the capital, but also to consider, in the interests of the tenant for life, whether the proposed security is

C. A. 1902 CHAPMAN v. BROWNE.

a proper income-bearing security: *In re Somerset.* (1) If a first mortgagee goes into possession, he can absorb every penny of rent until his debt and interest are satisfied, and meanwhile the tenant for life has no income. In the present case the greater part of the property was in hand and the grazing of it was being let, but that would not produce an income all the year round. The rental of the part that was let to tenants was comparatively small. Again, in the event of a fall in value, the greater the amount of prior incumbrances the greater the risk to a puisne incumbrancer. In the case of a first mortgage it would be comparatively rare that the whole amount secured would be lost. It is not merely a question of value, i.e., whether at the time of the investment there was, on a reasonable estimate of the value of the property, a sufficient margin beyond the amounts advanced upon it. It is a question whether this was a proper kind of investment in the case of trust funds. The two questions are wholly different. There may be a sufficient margin to make the investment a very reasonable one for a banker or regarded as a commercial speculation, and yet it may not be a proper one for a trustee: *Learoyd* v. *Whiteley.* (2) Whatever the value of the estate may be regarded as having been at the time of the investment in this case, it is clear that according to the English practice it would not have been an authorized investment for trustees. It is submitted that, having regard to the amount already charged on the estate and the fact that there were so many prior incumbrancers, the investment was not such as trustees, acting with reasonable prudence, ought to make. The only legal advice taken appears to have been as to the title to the property. No legal advice appears to have been taken on the question whether such a puisne mortgage was a proper security for trust funds. The consent of the female plaintiff was never obtained to the variation of the investment.

With regard to the question of relief under s. 3 of the Judicial Trustees Act, 1896, it is submitted that this is not a case in which the Court ought to give relief. *In re Stuart* (3) indicates

(1) [1894] 1 Ch. 231. (2) (1887) 12 App. Cas. 727.
(3) [1897] 2 Ch. 583.

the lines on which the Court proceeds under that section. The cases in which relief has been given under the section are cases of passive default or nonfeasance by the trustee, not cases of active breach of trust such as this. The question what a reasonable man might have done in managing his own property is not the test whether relief ought to be given: *Learoyd* v. *Whiteley* (1); *In re Grindey* (2); *Speight* v. *Gaunt* (3); *In re Roberts*. (4)

Ronan, K.C., in reply. Sect. 3 of the Judicial Trustees Act, 1896, applies whether the settlement in this case is an Irish settlement or an English one. It is part of the lex fori, and, if a plaintiff chooses to come to an English Court, the power given by that section is applicable to his case. In the case of *In re Turner* (5) Byrne J. held that the power given by the section was meant to be acted on freely and fairly in the exercise of judicial discretion, if the Court were satisfied that the trustee acted reasonably as well as honestly, but that each case depends on its own circumstances, and no general rules or principles could be laid down as to the exercise of the discretion.

Cur. adv. vult.

March 26. ROMER L.J. read the following judgment:—It is not necessary to decide the question which was argued before us whether the marriage settlement is to be regarded as an Irish settlement, or whether it is to be regarded as an English one. On the question whether the defendant has committed a breach of trust there is no difference between the law of Ireland and the law of England. In an Irish settlement, as in an English one, if trustees have power to invest trust funds on the security of land in England, the laws of the two countries as to whether a particular investment on English land is or is not a breach of trust are the same. So, if the trustees have power to invest on the security of land in Ireland, the laws of the two countries as to whether a particular investment on Irish land is or is not a breach of trust are the same.

(1) 12 App. Cas. 727.
(2) [1898] 2 Ch. 593.
(3) (1883) 9 App. Cas. 1.
(4) (1897) 76 L. T. 479.
(5) [1897] 1 Ch. 536.

C. A. 1902 CHAPMAN v. BROWNE. Romer L.J.

Nor is it necessary to decide whether the settlement in this case is Irish or English for the purpose of the question whether the benefit of the Judicial Trustees Act, 1896, can be claimed by the defendant; for, assuming, as I shall do, that the defendant is entitled to claim the benefit of that Act, he is, in my opinion, for the reasons hereafter given, not thereby exonerated from liability if the investment impeached in the action was a breach of trust on his part.

The main question in this action is whether that investment, which was on the security of Irish land subject to prior mortgages, was a breach of trust. Now it is clear that, if a corresponding security had been taken on land in England, it would have been a breach of trust. But it is said that owing to the registration laws affecting incumbrances on lands in Ireland at the time the investment was made, and to the powers of the Irish Courts with regard to the sales of incumbered estates and to the practice not to decree foreclosure in actions concerning mortgages, the security was a safe and proper one for trustees to take. Now undoubtedly the laws and practice to which I have referred do in several respects render a puisne mortgage on land in Ireland a less dangerous or undesirable security than a puisne mortgage on land in England; and it has been decided in Ireland that a loan of trust funds on a second mortgage of land in Ireland is not, of itself, and in the absence of other circumstances, a breach of trust. See *Smithwick* v. *Smithwick* (1) and *Crampton* v. *Walker* (2), where that view was applied in favour of trustees in respect of securities which, I am bound to say, appear to me on their face to be somewhat undesirable ones for trustees to take. Now those decisions are not binding upon this Court, but I need scarcely say that they ought to be received with the greatest respect and consideration, and are of great weight, especially so far as they decide a question of principle, though the applications of that principle to the special facts before those Courts in the cases in question are not so important. The judges who decided those cases were naturally more familiar than we can be with the Irish Registration Acts and their effect, and with

(1) 12 Ir. Ch. Rep. 181. (2) 31 L. R. Ir. 437.

the powers and practice of the Irish Courts; and this must of course be borne in mind by us. But we are fortunate in the assistance rendered to us by Mr. Ronan, K.C., who was one of the appellant's counsel. He is familiar with the Irish law and practice, and called our attention to the distinctions between English land and Irish land as security, so far as those distinctions are important for the purposes of this appeal, and he referred us to the decisions of the Irish Courts bearing on the points we have to decide. Under these circumstances I find myself able to come to a decision with regard to the investment we have to consider in this case.

It does not appear to me necessary to determine as an abstract question whether or not a second mortgage on land in Ireland is in itself, apart from other considerations, of necessity a bad security for trustees to take for their trust funds. But I think I ought to say this. The judges in Ireland in the cases I have referred to appear to a great extent to base their judgment as to the difference as a security between second mortgages of land in England and second mortgages of land in Ireland on the fact that in Ireland there can be no tacking and no foreclosure. But the objections to second mortgages of land in England are not based solely on the risk of tacking and the liability to foreclosure. There are other objections, and some of these appear to me to apply to, at any rate, some second mortgages of land in Ireland, including the mortgage in question in this action. I shall refer to these hereafter when I point out the grounds on which I think the mortgage now in question was an improper security for the defendant to take for the trust money he advanced upon it.

The nature of the mortgage, which was effected in 1871, will be seen from the following short statement, which is substantially correct, although the exact details are not perfectly clear. The land was subject, in the first place, to two mortgages for 4700*l.* and 2460*l.* respectively. Then came a mortgage for a sum which was originally 17,900*l.*, but which may be taken as reduced at the time of the defendant's investment to 12,150*l.*, or thereabouts. This last-mentioned mortgage was sub-mortgaged—first for a sum of 4000*l.* and then for a sum of 2153*l.*, and then came a sub-mortgage for 5000*l.*, and it was

C. A. 1902 CHAPMAN v. BROWNE. Romer L.J.

this last sub-mortgage which was substantially the security taken by the defendant and his co-trustee. The 5000*l.* was secured collaterally by a covenant by the owner of the land for the payment of the 5000*l.* and interest, and by a charge on the land created by the owner, but this last-mentioned charge would of course rank after the full charge for 12,150*l.* The trustees obtained with their security neither the legal estate nor the title-deeds. If for any reason they wished to redeem the prior mortgages they had no trust funds available for the purpose. The sums secured by the prior mortgages were clearly considerable. So long as these prior mortgages existed the trustees had no control over them. The prior mortgagee, who had the legal estate, could at any time have taken possession, but the trustees, not having the legal estate, could not, under ordinary circumstances, take possession. They could only apply, if their interest was in arrear or other circumstances justified the application, for a receiver, and that subject to the rights of the prior mortgagees; and, as hereafter is pointed out, it is no sufficient answer for the trustees to say that they might have applied to the Court in Ireland for an order for the sale of the estate and for the appointment of a receiver. As an additional fact to be mentioned, not wholly without importance, I notice that in the mortgage of August 31, 1871, it was provided that, so long as the mortgagor paid interest on his mortgage debt and performed his covenants, the principal sum of 5000*l.* was not to be called in by the mortgagees for a period of nearly four years. And I must further point out that as third sub-mortgagees the trustees would have had no control over the rights and powers conferred by the mortgage for 12,150*l.* The first sub-mortgagee, being the assignee of the debt and security, would have had the control over them, although no doubt the third sub-mortgage would be considered as an incumbrance for the purposes of the Landed Estates Court (Ireland) Act, 1858 (21 & 22 Vict. c. 72). Further, I must point out that the owners of the prior mortgages might, relying on their position as prior incumbrancers, have let the interest on their debts accumulate to a considerable extent, and the trustees might have known nothing about the matter until they discovered too late that the charges in front of theirs

were enormously increased. Again, the prior mortgagees might have exercised powers of sale before the trustees could take proceedings to stop the sale. If the prior mortgagee having the legal estate went into possession of the mortgaged property, the whole of the income might have been stopped, and there might have been nothing forthcoming to pay the interest on the trust security. If the trustees took proceedings in the Incumbered Estates Court or elsewhere to obtain a sale of the estate, some time might elapse before even a binding order of the Court for a sale could be obtained, and even after such an order was obtained there might be a considerable lapse of time before a sale could be effected. Indeed in this case a sale was ordered as far back as 1894 or thereabouts, and no sale has been effected up to the present time, although this particular delay is no doubt largely due to comparatively recent circumstances. But in any case, pending a satisfactory sale being effected under the order, the trustees might receive no income from the mortgaged property. The prior mortgagees would be entitled to receive the income if in possession, and even when a receiver was appointed by the Court he would have to apply the income in the first place for the benefit of the prior mortgagees. Our Courts have always considered it a matter of importance to be borne in mind by a trustee contemplating an advance of trust money on security of realty under the provisions of settlements of an ordinary kind like this marriage settlement that the security should be one which, in case of the mortgagor not being able to pay, could readily be made available to yield income to pay the interest which might be required by a tenant for life or possibly for the maintenance of some infant cestui que trust. In a case like the present all income might be stopped for years, as, indeed, has happened. The right of an incumbrancer to apply under s. 43 of the Act 21 & 22 Vict. c. 72 for a sale of the land affords no sufficient remedy to a trustee who is only a puisne incumbrancer, for the reasons I have already pointed out; and in addition to those reasons I may add that under s. 53 of the last-mentioned Act the judge has a discretion as to ordering a sale, and an incumbrancer might possibly not be able to obtain an order, especially if no interest was actually in arrear and all the other

C. A. 1902 CHAPMAN v. BROWNE. Romer L.J.

incumbrancers opposed a sale. Again, in the present case a considerable part of the mortgaged land was in hand at the time of the mortgage. That might at the time have been even of advantage, when there was a resident owner to manage the estate. But if bad times came—and a prudent investor ought to contemplate the possibility of that happening—and the resident owner was no longer there to manage, considerable risk might be involved in the management of such an estate by a mortgagee in possession or by a receiver. Moreover, on a question of title, notwithstanding the provisions of the Irish Registration Act to which I have referred, a puisne mortgagee, who has not the deeds or the legal estate, has to run a risk. An equitable mortgagee by deposit of deeds without writing may obtain a perfectly good charge as against a subsequent registered mortgage: see *In re Burke's Estate*. (1) It is said on behalf of the defendant that this only necessitates careful inquiry on behalf of an intending puisne mortgagee as to where the deeds are and on what account they are held; but the inquirer might be misled, and why should a trustee run any unnecessary risk? A trustee is not obliged to lend trust money on a puisne mortgage. In the present case the defendant would have had no difficulty in obtaining as security a first mortgage on lands in England or Ireland, assuming even that he had been obliged to invest on some mortgage. And I may here refer to the fact that in the present case, so far as I can see, no inquiry as to the title-deeds was made at all. Looking at all those circumstances, I cannot bring myself to think that the defendant was justified as trustee in taking the security in question. This renders it unnecessary for me to consider the question as to the true value of the estate at the time the advance was made, upon which, also, Cozens-Hardy J. came to a conclusion adverse to the defendant.

This brings me to a consideration of the last question, whether, assuming that the Judicial Trustees Act, 1896, applies, the defendant is protected by the provisions of s. 3. Now, that the defendant acted "honestly" is clear. But I regret to say that, desirous as I am of giving to trustees the benefit of the section and of not unduly curtailing the application of its

(1) 9 L. R. Ir. 24.

provisions, I do not see my way to hold in the circumstances of this case that the defendant has acted "reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach." It does not appear to me that the defendant ever really considered the question whether the security he took was one which in its nature it was prudent and right for him as a trustee to take. He took no advice on the point. Counsel was employed to settle the form of the security taken, but was not asked to advise and did not advise the trustees as to whether such a security was one that, under all the circumstances of the case, could prudently and properly be taken by them. A solicitor was employed, but he was acting for the mortgagor also, and clearly was not a proper person to be employed by the trustees for the purpose of advising them on the point in question; and, indeed, on the evidence as a whole, I cannot say that it satisfies me that the solicitor ever did advise them on the point. All that the defendant can say on the subject in his evidence is that he saw the solicitor (Mr. Wade) five or six times about the particulars of the property, and that Mr. Wade satisfied him particularly about the investment and that it would come within the four corners of the marriage settlement. This is not satisfactory, and Mr. Wade is dead; but his entries of charges against the trustees are forthcoming and have been put in evidence, and there is no entry shewing any advice given by him to them on the point in question. The evidence of Mr. Wade's clerk, so far as it goes, also tends to negative the idea of any such advice having been given. And Cozens-Hardy J. holds that the trustees did not act reasonably, and he points out that they, or one of them, suggested the advance and accepted the security on the unsupported statement of the particulars of the estate furnished by or on behalf of the mortgagor. It is said on behalf of the defendant that he ought to escape liability because it is suggested that if, before accepting the security, he had taken the advice of counsel in Ireland he would have been advised that the security was a proper one for him as trustee to accept; and it is further said that, even if he had brought the matter before an Irish Court for directions, that Court

C. A. 1902 CHAPMAN v. BROWNE. Romer L.J.

would have sanctioned the advance on the security in question. But it is difficult to determine what might have happened in the hypothetical case of the defendant's having taken steps which he never did take; and I cannot assume that, if those steps had been taken and the facts as to the security had been properly stated to counsel or to the Court, the trustees would have been advised or authorized to make the advance. There is another consideration which appears to me fatal to this argument on behalf of the defendant. If counsel had been asked to advise as to, or the Court to sanction, the security, the first thing that would have been required by counsel or by the Court is the consent to the proposed investment of the plaintiff, Mrs. Chapman, which was necessary under the settlement, and was not, in fact, obtained by the defendant; and I cannot assume as against her, if her consent had been asked after a proper explanation of the nature and circumstances of the proposed security, that she would assuredly have consented to the change of investment. It appears to me, therefore, that I cannot hold that the defendant has brought himself within the provisions of s. 3. I ought, perhaps, to say a word on the argument on behalf of the defendant that he ought not to be held liable on the ground that the loss to the trust estate has occurred, not from any defect in title or from the nature of the security taken, but solely from the unforeseen depreciation in value of the lands mortgaged. But the answer is obvious. If the trustee had acted as he should have done, and not invested on the security in question, the loss would not have occurred to the trust estate.

In my opinion, the appeal fails, and should be dismissed with costs.

COLLINS M.R. The judgment which has just been read is the judgment of the Court. (1)

Solicitor for plaintiffs: *Francis H. White, for Forshaw & Parker, Preston.*

Solicitors for defendant: *Iliffe, Henley & Sweet.*

(1) Collins M.R., Romer L.J. and Mathew L.J.

E. L.

In re HILL.
HILL *v.* HILL.

[1901 H. 2413.]

C. A.
1902
March 19, 20, 26.

Heirlooms—Bequest to descend with Dignity—Period of Absolute Vesting.

A testatrix bequeathed diamonds to her son Viscount Hill (who survived her) "until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds shall descend as heirlooms as far as the rules of law and equity will permit."

Held, that the case was governed by *Tollemache* v. *Earl of Coventry*, (1834) 2 Cl. & F. 611; 37 R. R. 260, and that, notwithstanding the words "as far as the rules of law and equity will permit," on the death of Viscount Hill, the son of the testatrix, his successor in the title became absolutely entitled to the diamonds.

Decision of Swinfen Eady J., ante, p. 537, affirmed.

APPEAL from the decision of Swinfen Eady J. (1)

Ann, Dowager Viscountess Hill, by her will dated May 28, 1891, appointed executors and trustees, and she thereby bequeathed some diamonds, two miniatures and a ring to her son Rowland Clegg, the third Viscount Hill, "until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, or any other title or dignity which may be granted to or assumed by any person for the time being entitled to the said title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit."

The testatrix died on October 31, 1891. Her son the third Viscount Hill survived his mother, and entered into possession of the chattels thus bequeathed. He died on March 30, 1895, and was succeeded in the title by his son, the plaintiff Rowland Richard Clegg, fourth Viscount Hill, who was born in 1863.

(1) Ante, p. 537.

C. A. 1902 HILL, *In re.* HILL *v.* HILL.

The plaintiff was married, but had not any issue. The heir-presumptive to the title was the plaintiff's brother, the defendant Francis William Clegg Clegg Hill, who was born in the year 1866 and was unmarried.

The plaintiff took out an originating summons for the determination of the question whether he was entitled absolutely or for life only, or otherwise, to the diamonds and other chattels thus bequeathed.

Swinfen Eady J. held that the plaintiff was entitled absolutely.

The defendant appealed.

Brinton, for the defendant. It is submitted that the limitation of the chattels to descend with the title is good. The addition of the words "as far as the rules of law and equity will permit" prevents any violation of the rule against perpetuities, and the chattels may lawfully go with the title during the existence of lives in being at the death of the testatrix and for twenty-one years afterwards, or at any rate during the period of twenty-one years from her death, so that they would not become the absolute property of any holder of the title until the expiration of one of those periods. *Tollemache* v. *Earl of Coventry* (1) appears, no doubt, to be opposed to this view, but it was disapproved by Lord St. Leonards, Sugden's Law of Property, pp. 336, 338, and also in some other cases. And *Countess of Harrington* v. *Earl of Harrington* (2), *Montagu* v. *Lord Inchiquin* (3), and *In re Johnston* (4) are in favour of the appellant.

[STIRLING L.J. referred to *In re Viscount Exmouth.* (5)]

If this is not the true view of the gift, then the whole limitation of the chattels is void as an attempt to create a perpetuity, and in that case the defendant will take them as residuary legatee: *Countess of Harrington* v. *Earl of Harrington.* (6)

Micklem, K.C., and *Errington*, for the plaintiff. The point is covered by authority. When an attempt is made to annex chattels to an estate tail it is well settled that they vest abso-

(1) 2 Cl. & F. 611; 37 R. R. 260.
(2) (1871) L. R. 5 H. L. 87.
(3) (1875) 23 W. R. 592.
(4) (1884) 26 Ch. D. 538.
(5) (1883) 23 Ch. D. 158.
(6) L. R. 5 H. L. 106.

lutely in the first tenant in tail, unless there is a clause of defeasance. The tenancy of a peerage is a tenancy in tail: *In re Sir J. Rivett-Carnac's Will.* (1) *Tollemache* v. *Earl of Coventry* (2) is identical with the present case. Comments have indeed been made on that decision, but it has never been departed from, and it is binding on this Court: *Lord Dungannon* v. *Smith* (3); *Mackworth* v. *Hinxman* (4); *In re Viscount Exmouth* (5); *In re Johnston* (6); *Shelley* v. *Shelley* (7); *Countess of Harrington* v. *Earl of Harrington* (8); *Lord Scarsdale* v. *Curzon.* (9) Nor is *Montagu* v. *Lord Inchiquin* (10) adverse to the plaintiff. The judgment of Lord St. Leonards in *Ker* v. *Lord Dungannon* (11) shews that, notwithstanding his comments on *Tollemache* v. *Earl of Coventry* (2) in his book on the Law of Property, he recognised that judicially he was bound by the decision of the House of Lords in that case.

As to the suggestion that the bequest of the chattels is void in toto, if any part of it is void, the effect of the clause "as far as the rules of law and equity will permit" is to make the gift valid down to the interest given to the first tenant in tail, and he takes absolutely. This is in accordance with the previous decisions.

Brinton, in reply.

Cur. adv. vult.

March 26. VAUGHAN WILLIAMS L.J. read a judgment, in which (after stating the facts) he continued:—The question is, whether the plaintiff is entitled absolutely, or for life only, or otherwise, to the jewellery and other chattels bequeathed by the will to descend as heirlooms with the Hill title. In my judgment the plaintiff is entitled absolutely to the chattels. It seems to me that the case is really concluded by the decision of the House of Lords in *Tollemache* v. *Earl of Coventry.* (2) The words of the will in that case were almost identical with

(1) (1885) 30 Ch. D. 136, 141.
(2) 2 Cl. & F. 611; 37 R. R. 260.
(3) (1846) 12 Cl. & F. 546.
(4) (1836) 2 Keen, 658; 44 R. R. 309.
(5) 23 Ch. D. 158.
(6) 26 Ch. D. 538, 545.
(7) (1868) L. R. 6 Eq. 540.
(8) L. R. 5 H. L. 87, 101, 108.
(9) (1860) 1 J. & H. 40.
(10) 23 W. R. 592.
(11) (1841) 1 D. & War. 509, 536.

C. A.
1902
HILL, *In re.* HILL *v.* HILL.
Vaughan Williams L.J.

the words in the present case. In that case successive life estates were given to the widow and the named only son of the testator. In the present case a life estate is given to the named son of the testatrix, and in each case there is what I will call an heirloom clause, disposing of the heirlooms after the termination of the life estate. In the *Tollemache Case* (1) there were alive at the date of the will and of the death of the testator a son, who took a life estate, and living grandsons who might succeed to the title; and in the present case there were likewise a son, Rowland Clegg Hill, the third Viscount, who took a life estate, and living grandsons who might succeed to the title; and in my judgment the House of Lords did in *Tollemache* v. *Earl of Coventry* (1) decide that the third Lord Vere—that is to say, the first taker under the description, "such person as shall from time to time be Lord Vere"—took the heirlooms absolutely. I know that this has been doubted by some of the judges who wrote opinions in *Lord Dungannon* v. *Smith* (2); but, for reasons which I will give presently, I am of opinion that the House of Lords did so decide, and did not, as has been suggested, merely negative the title of the fourth Lord Vere. If this view is right, it seems difficult to see why the plaintiff must not, on the basis of that judgment, take the heirlooms absolutely. The contrary contention can only be maintained on the assumption either that the plaintiff, the fourth Viscount Hill, takes only a life interest in the chattels, or that he takes no interest at all in the heirlooms as being in his turn the person bearing the title of Lord Hill. The suggestion that he takes only a life estate, or only the use of the heirlooms, seems to be based upon the argument that, as the plaintiff and his brothers were all "lives in being" at the date of the will of their grandmother, they are all persons to whom the user of, as distinguished from the property in, the heirlooms might be given; and that, therefore, in pursuance of the obvious intention of the testatrix to preserve the chattels as heirlooms as long as possible, we ought, if possible, so to construe her will as to limit the interest of all these grandsons living at the death of the testatrix to use and enjoyment only,

(1) 2 Cl. & F. 611; 37 R. R. 260. (2) 12 Cl. & F. 546.

and to treat the will as giving the absolute property to the Lord Hill who first takes the heirlooms on the determination of the "life or lives in being," and who, therefore, must take within a period which does not offend against the rule against perpetuities. So to do would be really to give effect to the view of Leach V.-C. in the *Tollemache Case* (1), when before him under the name of *Lord Deerhurst* v. *Duke of St. Albans*. (2) This view he thus expresses (3): "By the rules of law and equity, every person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only. The son and the grandson of the testator were living at his death, and were both therefore limited to the use and enjoyment only; but the child who succeeded the grandson as Lord Vere, and Duke of St. Albans, was not living at the death of the testator, and could not therefore by the rules of law and equity be limited to the use and enjoyment only. He took therefore an absolute interest." But, whatever else may be doubtful in the decision of the House of Lords, there can be no doubt but that they negatived this view of Sir John Leach; for they held that the great-grandson did not take at all. It follows that in the present case it is impossible to treat all the persons living at the date of the will of the testatrix as taking (if they take at all as holders of the title) life estates—that is, mere use and enjoyment.

Neither do I think it possible to hold that the present plaintiff takes no interest. The ground on which I understand it is suggested that this may be the case is, that the bequest to the person for the time being holding the title (even when qualified with the words "as far as the rules of law and equity will permit") is void as including persons who possibly might come into existence at a time so remote as to offend against the rule against perpetuities; and that, if the bequest is void as regards one person who might fall within the category of those the testatrix meant to benefit in succession, it is void as to all. I cannot assent to this argument. The answer to it is admirably put by Sir C. Pepys (afterwards Lord Cottenham) and Mr. Preston in their argument in *Tollemache* v. *Earl of*

(1) 2 Cl. & F. 611; 37 R. R. 260. (2) (1820) 5 Madd. 232. (3) 5 Madd. 277.

C. A.
1902
HILL, *In re.*
HILL *v.* HILL.
Vaughan Williams L.J.

Coventry (1), in which it is pointed out that the first member of the series, the Lords Vere, the first taker of the title of Lord Vere after the survivor of the holders of the life estate in the heirlooms, takes under a bequest which must of necessity vest, if it ever vests, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of that life, and was, therefore, good in law; whereas the executory bequest over to the person who would be Lord Vere next in succession after that first taker of the title was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the dropping of any such life, and, therefore, was not valid. The first member of this series must take on the death of the tenant for life, and, therefore, at not too remote a period, although the second and all the later members might take beyond the limits fixed by the rule against perpetuities; and I do not quite understand why Cresswell J., in *Lord Dungannon* v. *Smith* (2), says that the whole of the reasoning of Lord Brougham in *Tollemache* v. *Earl of Coventry* (3) shews that the executory bequest, after the death of the second Lord Vere, was void, because it possibly might not vest in due time, and that the decision, therefore, must be taken to have been, not that the bequest was good as to the third Lord Vere, but that it was bad as to the fourth. I see nothing in the reasoning of Lord Brougham inconsistent with his adoption of the argument of Sir C. Pepys and Mr. Preston; and Lord St. Leonards, who, in his Law of Property, p. 336, seems to have doubted this, himself in *Ker* v. *Lord Dungannon* (4) refers to the decision in *Tollemache* v. *Earl of Coventry* (3) as having been to that effect. The decision in this sense seems to me to have been frequently recognised in later cases—see the decision of Fry J. in *In re Viscount Exmouth* (5) and that of Chitty J. in *In re Johnston*. (6)

(1) 2 Cl. & F. 617.
(2) 12 Cl. & F. 566.
(3) 2 Cl. & F. 611; 37 R. R. 260.
(4) 1 D. & War. 509, 536.
(5) 23 Ch. D. 158, 163.
(6) 26 Ch. D. 538.

I wish to make an observation on *Countess of Harrington* v. *Earl of Harrington* (1), which was much pressed upon us in argument. Mr. Brinton argued that that case shewed that the words "as far as the rules of law and equity permit" would justify the Court in holding that no Lord Hill could claim the chattels absolutely so long as there were persons living at the date of the death of the testatrix who could succeed to the title. But that case turned upon a proviso preventing the personalty from vesting absolutely in a tenant in tail unless he should attain twenty-one, and it was contended that the proviso had the effect of carrying on to those who came next in remainder after the taker on the determination of the life estate, so exposing itself to be rendered void as aiming at perpetuity; but the House of Lords held that the proviso was an essential part of the gift, and, therefore, controlled by the words in the dispositive clause, "so far as the rules of law and equity permit." The effect of this was to limit the proviso so as that it should only apply to tenants in tail who took by purchase, and consequently it could not be said that the proviso was void as aiming at perpetuity. For the reasons I have given I think that the decision of Swinfen Eady J. should be affirmed, and the appeal dismissed.

STIRLING L.J. I agree with the judgment which has been just delivered by my Lord. In particular I think that we are bound by the decision of the House of Lords in *Tollemache* v. *Earl of Coventry*. (2) The ratio decidendi of that case cannot, I think, be more clearly or more compendiously stated than in the following passage in the argument of Sir C. Pepys and Mr. Preston (3): "The gift was to a class of persons in succession, viz. Lords Vere, and not to individuals. The executory bequest of the chattels to the person who should be first taker of the title of Lord Vere, after the death of the survivor of the testator's widow and son, was a bequest which must of necessity vest, if it ever vested, in some person who either was in existence at the time of the testator's death, or

(1) L. R. 5 H. L. 87. (2) 2 Cl. & F. 611; 37 R. R. 260.
(3) 2 Cl. & F. 617.

C. A. 1902 HILL, *In re.* HILL *v.* HILL. Stirling L.J.

would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life; and was therefore good in law. But the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title, was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the dropping of any such life; and therefore was not valid." It is true that those words occur, not in the speech of the Lord Chancellor in advising the House of Lords, but in the argument of the appellants' counsel. Nevertheless I think that those words form the groundwork of the decision of the House of Lords. The most difficult step, in my opinion, was the first, namely, that the gift was to a class of persons in succession, namely, Lords Vere, and not to individuals. Now, a large part of the Lord Chancellor's speech was devoted to dealing with that proposition. He appears to me to sum it up and to express it with the utmost clearness at p. 631, where he said: "It is a fallacy, as it appears to me—it is a play upon words, to say that Lord Vere was in esse, because the individual Beauclerk, who afterwards happened to become Lord Vere, was in esse at the time. There was not a Lord Vere in esse, nor ex vi termini could there be said to be a Lord Vere in esse till that individual, whom, quasi (1) individual, we admit to have been in esse, came to be Lord Vere."

As regards the difference pointed out in the passage just quoted between the position, with reference to the rule against perpetuities, of the first taker of the title of Lord Vere after the death of the survivor of the testator's widow and son, and that of the person who would be Lord Vere next in succession after such first taker of the title, it is not explicitly mentioned by the Lord Chancellor, but I cannot help thinking that that is the distinction to which he alluded. He said (2): "I must run in the face of authority if I denied the third Lord Vere's right; but I have no decision nor any authority supporting the other."

(1) *Sic.* (2) 2 Cl. & F. 633.

For these reasons I think the appeal should be dismissed, the plaintiff being, in accordance with that decision of the House of Lords, absolutely entitled to the chattels.

COZENS-HARDY L.J. If it were now open to us so to decide, I think it might be reasonable to hold that the words "as far as the rules of law and equity will permit" should be treated as a direction so to frame the limitations that the heirlooms should go with the title as long as possible, or, in other words, to regard the bequest as an executory trust. But it has long been settled that such is not the effect of those words.

It only remains to construe the words as they stand, and I think it is not possible to avoid the conclusion that the present Viscount takes the jewels and heirlooms absolutely, and that there is no shifting clause in favour of the next successor to the title.

I entirely agree with the judgment of Vaughan Williams L.J., and I do not desire to add anything to what he has said.

Solicitors: *Chester & Co., for Lucas & Salt, Wem; Upperton & Co.*

W. L. C.

C. A.

1902

Jan. 21, 23; *March* 3.

JACOBS *v.* MORRIS.

[1899 J. 1799.]
[1899 J. 2053.]

Principal and Agent—Power of Attorney—Construction—General Words—Ejusdem generis—Borrowing by Agent—Representation of Authority—Excess of Authority—Money paid into Banking Account of Principal—Money in Possession of Principal—Money had and received to Use of Principal—Misappropriation by Agent—Liability of Principal to Lender—Conduct—Constructive Notice—Estoppel.

The plaintiff carried on business as a tobacco merchant in Melbourne, Australia, under a firm name. He also had a London office bearing the firm name, at which the business of purchasing and paying for goods in London and shipping them to Melbourne was carried on. While absent in Australia he appointed an agent at the London office under a power of attorney, describing him (the plaintiff) as of Melbourne trading as a tobacco merchant under the firm name, and authorizing the agent for him (the plaintiff) and in his name, or in his trading name, "to purchase and to make any contract for the purchase of any goods in connection with the business carried on by me as aforesaid," and to make such purchase either for cash or on credit, with power to modify or cancel the contracts for purchase, and "where necessary in connection with any purchase made on my behalf as aforesaid, or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises, and to sign the plaintiff's name or his trading name to any cheques on his banking account in London.

The agent, purporting to act under the power of attorney, obtained a loan of 4000*l.* from the defendants, a firm of cigar merchants in London who had previously had frequent business dealings, including loan transactions, with the plaintiff. On applying for the loan the agent, who was well known to the defendants, represented that the power of attorney authorized him to borrow money, and that the loan was required for the purposes of the plaintiff's business. At the same time he produced to them the power itself, but, being satisfied with his assurances, they did not read it. On receiving the 4000*l.* the agent handed to the defendants as security bills of exchange for the amount accepted in his own name per pro the plaintiff's firm. He then paid the 4000*l.* into the plaintiff's London banking account, drew it out by cheques drawn by him under the power, and applied it to his own use.

The plaintiff, being at that time in Australia, had no knowledge of the loan transaction. In an action by him against the defendants to restrain them from negotiating the bills upon the ground that they had been accepted without his authority, and upon a counter-claim by the defendants

against the plaintiff for the 4000*l.* as money had and received by him to their use:—

Held, (1.) upon the construction of the power of attorney, that it gave the agent power to purchase only, with such powers as were necessarily implied by the appointment of the agent as purchasing agent, and did not confer authority to borrow; and (2.) that the primary cause of the loss of the 4000*l.* was the neglect by the defendants of ordinary business precautions when lending the money to the agent, and that they were therefore estopped by this neglect, and also by constructive notice that the agent had no power to borrow, from claiming it as money had and received by the plaintiff to their use.

Quære, per Vaughan Williams L.J., whether the circumstances were such as to entitle the plaintiff to plead ignorance or absence of means of knowledge of the transaction as constituting by itself a sufficient answer to the defendants' claim as for money had and received.

Marsh v. *Keating*, (1834) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75, discussed.

Decision of Farwell J., [1901] 1 Ch. 261, affirmed.

APPEAL against the decision of Farwell J. (1)

In 1888 the plaintiff, Louis Jacobs, became a partner in an old-established firm of tobacco and cigar merchants carrying on business in Melbourne, Australia, under the name of Jacobs, Hart & Co.

The defendants, Morris & Morris, were a firm consisting of three partners, Arthur Morris, William Morris, and Walter Morris, carrying on business as cigar merchants at 4, Cullum Street, in the City of London. They had had business dealings with the plaintiff's firm since 1889.

In 1898 the plaintiff became the sole owner of the business of Jacobs, Hart & Co. Since 1882, and to enable the plaintiff's firm to transact necessary business in connection with buying and paying for goods, principally cigars, and shipping them to Melbourne, they had had an office in London, No. 120, London Wall. The name of the plaintiff's firm was over the office door, and the firm's name appeared on the letter-paper and in all business documents used in carrying on the office business. In 1888 the then partners in the firm, the plaintiff and his father, both of whom had at that time charge of the London office, went to Australia, leaving a representative or agent in charge.

(1) [1901] 1 Ch. 261.

C. A. 1902 JACOBS v. MORRIS.

In 1893 or 1894 the plaintiff's brother, Leslie Jacobs, who was then carrying on in London the general business of a commission agent on his own account, became the firm's representative or agent at the London office, and on January 24, 1899, the plaintiff, who was then in Melbourne, executed a power of attorney—which described him as of Melbourne, "trading as a tobacco merchant and manufacturer under the style of 'Jacobs, Hart & Co.'"—appointing Leslie Jacobs, therein described as "commercial agent," attorney, "in and throughout the United States and the continents of America and Europe and all other parts of the world other than Australasia and New Zealand for me and in my name, or in my said trading name, to purchase and to make and enter into, sign and execute any contract or agreement with any persons, firm, company or companies for the purchase of any goods or merchandise in connection with the business carried on by me as aforesaid, or for the purchase or acquisition by me of any patent rights or the right to the exclusive or partial use of any patent or invention, or for the purchase or acquisition of the right to act as the sole or partial agent of any person, firm or company, and to make any such purchase or acquisition, either for cash or on credit, or partly for cash and partly on credit, as my said attorney shall in his discretion think advisable." Then there was a power to modify or vary the terms and conditions of such contracts, or wholly cancel the same, upon such terms as the attorney might deem advisable, and to demand and recover all moneys and things belonging to him, Louis Jacobs, trading as aforesaid, and to settle accounts. Then it continued: "And for me and on my behalf, and where necessary, in connection with any purchases made on my behalf as aforesaid, or in connection with my said business, to make, draw, sign, accept or indorse any bill or bills of exchange, promissory note or promissory notes, notes of hand or bills of lading which shall be requisite or proper in the premises, and to sign my name or my said trading name to any cheques or orders for the payment of money on my banking account in London, England." A banking account had been kept with the London and Westminster Bank in the name of the firm

continuously since 1882, but since 1893 it had been operated upon exclusively by Leslie Jacobs under the power of attorney, and it appeared that he had used it partly for the plaintiff's purposes and partly for his own. The office expenses were paid by himself, and he was paid for his services to the firm solely by commission.

The defendants, Messrs. Morris, were well acquainted with Leslie Jacobs, and were aware that he was acting for the plaintiff's firm under a power of attorney.

In 1898 and the early part of 1899 Messrs. Morris advanced considerable sums, to the total amount of some 3000*l.*, on loan to Leslie Jacobs, who purported to act for the plaintiff's firm, upon the security of bills of exchange accepted by him in the firm's name, all of which were duly met at maturity.

In June, 1899, Leslie Jacobs applied to Messrs. Morris for a fresh loan of 4000*l.*, which he represented that he was authorized to borrow on behalf of the plaintiff's firm, and this loan he eventually obtained. The circumstances under which the loan was so applied for and obtained were stated in detail by Arthur Morris, the senior member of the firm of Messrs. Morris, in his evidence in chief at the trial. His statement was to the following effect. He said that he was aware that loans to a considerable amount had from time to time been made by his firm to the plaintiff's firm, it being a common practice with them, Messrs. Morris, to make loans to customers. Leslie Jacobs having informed him that the plaintiff's firm contemplated pushing their business by buying a cigarette manufactory, and wanted cash for that purpose, and also for purchasing the necessary machinery and leaf tobacco, proposals for a loan were then discussed, and eventually, early in June, 1899, an interview between Arthur Morris and Leslie Jacobs took place at the latter's office, when there was a further conversation about the proposed loan. Arthur Morris's version of the conversation was as follows: "Leslie Jacobs said, 'If you do oblige us in this way, it will be a very good thing for you. We will introduce and push your proprietary brands in Australia.' I said, 'All right.' I was very pleased to hear it. I was very strongly desirous of having our

C. A. 1902 JACOBS v. MORRIS.

proprietary brands that were owned by us introduced on to the market by a pushing and long-established house, and so we agreed to do it. He (Leslie Jacobs) said, 'Of course I have got full power to borrow money.' I said, 'I know you have.' He said, 'Here is my power of attorney'; and he produced it. I said, 'It is not necessary; I will take your word in a case like this: it is good enough for me.' But he produced the power of attorney, and said, 'Oh, look at it—read it.' I read a few lines, and said, 'I do not understand this sort of thing; besides, if you tell me you have power to borrow the money'—and I remembered that we had actually advanced the firm money—'that is good enough.' He said, 'If you are not quite sure about my power'—though I had assured him that I was—'I will cable my people in Melbourne to cable to you that we actually require that loan.' I said, 'It is absurd; it is quite unnecessary.' In fact, I thought it would have been offensive: it would have appeared as if I doubted his word, which I had no reason to do at that time." A few days afterwards, on June 12, 1899, an interview took place between Arthur Morris and Leslie Jacobs at the office of the former, when Leslie Jacobs again referred to the request he had made at the previous interview that Messrs. Morris should lend the plaintiff's firm 4000*l.*, and the result was that on the same day it was arranged verbally that Messrs. Morris should lend the plaintiff's firm the sum of 4000*l.*, at 4 per cent. interest, upon the security of bills of exchange, to be accepted by the plaintiff's firm, whereupon Messrs. Morris handed to Leslie Jacobs two cheques for 2000*l.* each drawn to the order of the plaintiff's firm, one being dated June 12 and the other June 20, 1899. In exchange for the cheques Messrs. Morris received from Leslie Jacobs four bills for 1000*l.* each, with interest added, all dated June 12, 1899, and respectively payable three, six, nine, and twelve months after date, each bill being accepted by Leslie Jacobs as follows: "Per pro Jacobs, Hart & Co. Leslie Jacobs." It was also arranged between Arthur Morris and Leslie Jacobs at the interview on June 12, 1899, that as a condition of the loan the plaintiff's firm should push Messrs. Morris's proprietary brands of cigars in Australia.

The two cheques for 2000*l.* each were paid by Leslie Jacobs, on June 13 and 20 respectively, into the account of the plaintiff's firm with the London and Westminster Bank, each being indorsed "Jacobs, Hart & Co. pp. Leslie Jacobs."

On June 12, the date on which the first cheque for 2000*l.* was handed to Leslie Jacobs, a sum of 25*l.* only was standing to the credit of the plaintiff's firm at the London and Westminster Bank, and the whole 4000*l.* was drawn out within some eighteen days afterwards, that is, before July 1, by Leslie Jacobs by means of cheques drawn by him in the name of the plaintiff's firm. The money so drawn out, or the greater part thereof, was applied by Leslie Jacobs to his own purposes. Both he and the plaintiff were examined and cross-examined, and each stated that the plaintiff himself received no benefit from the 4000*l.* paid into his banking account, Leslie Jacobs stating positively that he had used the whole for his own purposes; but the pass-book contained entries leading, apparently, to the inference that some portion at least of the money had gone in payment of debts due from the plaintiff's firm. During the whole of these transactions the plaintiff was absent in Australia.

The course of business in the case of purchases of goods in London on account of the plaintiff's firm was this. For the purpose of putting the firm's London representative or agent in funds to pay for the goods, an arrangement was come to between the firm and their Australian bankers, who had a branch in London, to make advances in the following manner: When Leslie Jacobs bought goods for the firm, he took the invoice and the shipping documents to the London branch of the Australian bank, together with a bill of exchange drawn by him in the name of the firm upon the firm itself. Upon these documents the London branch handed him a cheque for the net amount of the invoice under a letter of credit given by the Australian bank to the firm, and sent by the firm to Leslie Jacobs. Leslie Jacobs then paid the money into the firm's account at the London and Westminster Bank, and paid for the goods by a cheque drawn in favour of the sellers on the same account. The plaintiff had no knowledge of any borrowing

C. A. 1902 JACOBS v. MORRIS.

under the power of attorney for the general purposes of the business, and, owing to his absence in Australia, he had no knowledge of the particular transactions in question in the present case until after the money had been misappropriated by Leslie Jacobs. In November, 1899, Leslie Jacobs became insolvent. The particulars of the loan transaction then came to the knowledge of the plaintiff, who thereupon commenced this action against Messrs. Morris and Leslie Jacobs, claiming (amongst other relief) an injunction to restrain them from negotiating, amongst others, the bills for the 4000*l.*, upon the ground that Leslie Jacobs had no authority, either express or implied, to borrow the money or to accept the bills upon his, the plaintiff's, behalf. Messrs. Morris counter-claimed against the plaintiff and Leslie Jacobs for payment of the sums due on the bills with interest thereon at 4 per cent., and alternatively for the 4000*l.* as money had and received by the plaintiff to the use of Messrs. Morris. At the trial of the action, the defendant, Leslie Jacobs, submitted to judgment, as stated in the report below. Upon the questions at issue between the plaintiff and the defendants Messrs. Morris, several witnesses were called, including the plaintiff himself, and Leslie Jacobs, as already stated, and also Messrs. Arthur and William Morris.

In delivering judgment Farwell J. held (1.) that Leslie Jacobs had no authority under the power of attorney to borrow the 4000*l.*, and his Lordship accordingly ordered Messrs. Morris to deliver up to the plaintiff the four bills for that amount; and (2.) with regard to Messrs. Morris's counter-claim against the plaintiff for the 4000*l.* as money had and received by him to their use, his Lordship held that the money did actually come into the possession of the plaintiff, because it went into his banking account, but that, as he had at the time no means of knowledge of the facts, he was not liable as for money had and received.

The defendants, Messrs. Morris, appealed.

The appeal was heard on January 21 and 23, 1902.

Neville, K.C., *Butcher, K.C.*, and *A. L. Morris*, for the defendants, Messrs. Morris. The first point is as to the con-

struction of the power of attorney—whether it includes a power to borrow. Such a power, though not expressed, ought, we submit, to be implied from the nature and object of the instrument. The object of the instrument is to enable the attorney to purchase and pay for goods on behalf of the plaintiff, and for that purpose it authorizes the attorney "in connection with any purchases made on my behalf as aforesaid, or in connection with my said business," to accept bills, &c., and we submit that the loan transaction now in question is covered by those words, especially the words "in connection with my said business," or otherwise they would be superfluous. The learned judge has held, upon the authorities, that those general words are to be limited to matters ejusdem generis with those already stated, and are not to be read by way of enlargement; but the authorities he cites do not bear out that view. In *Harper* v. *Godsell* (1) the decision rested, as Lord Blackburn points out, on the use of "unrestricted" words. Here we have not unrestricted words but specific words—"in connection with my said business"; so that the present case is distinguishable from that. It is not necessary for us to say that there is a general borrowing power: it is sufficient to say that there is a power to borrow in connection with the business. Then *Attwood* v. *Munnings* (2) is a similar case to *Harper* v. *Godsell*. (1) The power to buy for cash or on credit implied a power to borrow.

Upon the second point, as to our claim to the 4000*l*. as money had and received by the plaintiff to our use, the question arises, Which of two innocent parties, ourselves and the plaintiff, should suffer? We submit that of the two the plaintiff should be the one to suffer, for he was the party who, by giving his agent a wide authority to act for him, provided the opportunity which led to the loss. It is said that there is an equity against our getting back the money in that the plaintiff did not know and had no means of knowing that the money had been paid into his London banking account; but if he had taken ordinary business precautions and not neglected to make

(1) (1870) L. R. 5 Q. B. 422, 427.
(2) (1827) 7 B. & C. 278; 31 R. R. 194.

C. A. 1902 JACOBS v. MORRIS.

inquiries into the state of his banking account, this fraud by Leslie Jacobs might have been rendered impossible. Surely this neglect on the plaintiff's part raises a strong equity in our favour, for he cannot, under such circumstances, plead ignorance or want of knowledge as exonerating him from liability. Moreover, the business in London was in reality a branch of the Melbourne firm. The office bore the firm name, which was also used in all letters and other documents issued from that office, and in the London banking account; so that the money which was paid into the banking account of the plaintiff by his firm name should be regarded as having come into his possession, that is, under his control: *Marsh* v. *Keating*. (1) Such a claim as this has always been favourably considered by the Court, for it is an equitable claim to recover back money which ought not in justice to be kept; it is for money which ex æquo et bono the party charged ought to refund: *Moses* v. *Macferlan*. (2)

Upjohn, K.C., and *Johnston Edwards*, for the plaintiff. The evidence does not establish that the London office was a branch of the Melbourne firm. The London business was not a branch of the Melbourne business; it was solely a buying business. The real relation of the London agent to the Melbourne firm was that of a buying agent, remunerated by commission—nothing more; the agent having to pay the office expenses himself. The truth is that Leslie Jacobs, the London agent, was not exclusively the agent to the plaintiff's firm. The power of attorney describes him simply as "commercial agent"; and in fact he had other commission agencies besides the plaintiff's, and he used the firm banking account in such a manner as to make it his own. With regard to the construction of the power, the word "borrow" or "loan" is not mentioned from beginning to end. The power is simply to purchase and make contracts to purchase goods. That is its leading object, and that does not lead to the necessary implication that the attorney is to have power to borrow. This is a very carefully limited power of attorney—limited, that is,

(1) 1 Bing. N. C. 198, 219; 2 Cl. & F. 250; 37 R. R. 75.
(2) (1760) 2 Burr. 1005, 1012.

to doing certain specified things; and it must be construed strictly: *Bryant, Powis & Bryant, Limited* v. *La Banque du Peuple.* (1)

As to the claim for money had and received, we contend (1.) that the plaintiff never had the 4000*l.* in his possession or under his control; and (2.) that if laches are to be attributed to either party as enabling the London agent to commit the fraud, they should be attributed to Messrs. Morris, and not to the plaintiff, for it was their conduct in neglecting ordinary business precautions, especially in waiving the reading of the power of attorney when offered to them, that led to the fraud. Then the circumstances shew that, as between the London agent and the Melbourne firm, the banking account was in reality that of the agent. The question is, Did the person in whose name the banking account stood get the benefit of the money that was paid into it; or, if not, did it come under his control in such a manner that he might have had the benefit of it? When the money got into what should be regarded as the agent's banking account on June 13 and 20, 1899, the plaintiff had not the slightest knowledge of its being there. To make a man liable for money had and received it must be shewn that he had the money, or that it was under his control. Reliance is placed on *Marsh* v. *Keating* (2) as supporting the view that the payment of the money and the source from which it was derived might have been discovered if the plaintiff had used the ordinary diligence of men of business; but here the money was paid in on June 13 and 20, and the whole was drawn out before July 1st. It is clear that he had not any idea or suspicion, much less knowledge, of the loan transaction at the time. In order to throw the loss upon the plaintiff, it is necessary that Messrs. Morris should establish culpability on his part, but this they fail to do. Again, although the 2000*l.* cheques were given to Leslie Jacobs, Messrs. Morris have not shewn that the payments by him into the banking account were within the authority conferred on him by the plaintiff, assuming, that is, for this

(1) [1893] A. C. 170, 177, 179.
(2) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75.

C. A. 1902 JACOBS v. MORRIS.

purpose, that he had no general authority to borrow money. The propositions 3 and 4 laid down in Lindley on Partnership, 6th ed. p. 166, apply, namely, " (3.) The firm cannot be treated as receiving what one partner receives otherwise than as its real or ostensible agent, unless the money actually comes into the possession or under the control of the other partners. (4.) Agency being excluded in such a case as the last, the money cannot be considered as in the possession or under the control of the innocent partners, unless they know that it is so, or unless they are culpably ignorant of the fact." There is no evidence that the plaintiff knew or could have known that the money was paid to his account. The plaintiff is in no way estopped from denying the authority of Leslie. Leslie did not receive the money in the course of the business of the firm; and this distinguishes the present case from *Marsh* v. *Keating* (1); see also Lindley on Partnership, 6th ed. p. 170.

[COZENS-HARDY L.J referred to the observations of Collins J. in *Reid* v. *Rigby & Co.* (2)]

In that case the principal had had the benefit of the money. That is not so here.

[VAUGHAN WILLIAMS L.J. It is by reason of the authorized act of Leslie that the money is not in the bank to the plaintiff's credit.]

Knowledge by the principal is essential to make him liable. In *Cleather* v. *Twisden* (3), Bowen L.J. said that the Court must inquire whether, if the principals neither expressly authorized nor ratified the acts of the agent, " they consented that he should have general authority to act without their knowing what he did." In the present case the defendants chose to assume that Leslie had a general authority to manage the business of the firm, though the power of attorney shewed that he had no authority to borrow money. The acts done by the plaintiff and known to the defendants shewed that Leslie had no power to borrow money for the firm. There can be no estoppel as against the plaintiff. No duty is imposed on the

(1) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75.

(2) [1894] 2 Q. B. 40, 44.

(3) (1884) 28 Ch. D. 340, 350.

plaintiff beyond the written limited authority which he has given.

Neville, K.C., in reply. Upon the evidence non constat that the whole of the 4000*l.* was not applied for the benefit of the plaintiff's firm.

The proximate cause of the loss of the money was the authority which the plaintiff gave to Leslie to draw cheques on the account of the firm.

The acceptance of a bill of exchange in connection with the business of the plaintiff's firm was within the power of attorney. It does not signify whether the bills of exchange were accepted by Leslie: they were drawn by him, and he was authorized to draw bills. The money was advanced on the drawing of the bills, the shipping documents being attached. The issue to be tried is the same as that which arose in *Montaignac* v. *Shitta* (1), namely, was the particular mode of borrowing clearly outside the purposes of the business—outside the ordinary course of dealing? If it was not, the principal is bound by the acts of his agent.

Cur. adv. vult.

March 3. VAUGHAN WILLIAMS L.J. I am of opinion that the judgment of Farwell J. ought to be affirmed. The first question is as to the construction of the power of attorney. Does it include a power to borrow money? It contains no express power to borrow. [His Lordship read the power as above quoted, and, with reference to the latter clause of it, said:—]

This latter clause contains no express power to borrow, but it is said that the power to borrow arises by necessary implication from the words "in connection with my said business," to make, draw, sign, accept, or indorse any bill of exchange, promissory note, &c. It is said that these words, unless they have no effect, must authorize something more than accepting or making bills of exchange in connection with any purchases, because express power to do this is given just above in the earlier words of this clause. This argument seems to me well

(1) (1890) 15 App. Cas. 357.

C. A. 1902 JACOBS v. MORRIS. Vaughan Williams L.J.

founded; but it still remains to consider what is the authority to accept bills or give promissory notes which is given by these words beyond the power to do so in connection with purchases. It is a power to accept bills and make notes in connection with "my said business," that is, the business of a tobacco merchant and manufacturer carried on by the donor of the power under the style of "Jacobs, Hart & Co." at Melbourne. Now, in my judgment, this authority cannot extend beyond the powers, express or implied, given to Leslie Jacobs by his appointment contained in the power of attorney. The power of attorney does not contain any express power, except the power to purchase and do certain particularised things in connection with such purchases. In other words, the power of attorney appoints Leslie Jacobs the purchasing agent for the business carried on by Louis Jacobs, and gives him certain particularised powers in connection with purchases, and then goes on to give him this power of accepting bills and making notes in connection with the said business. In my judgment the later words are intended merely to cover such powers beyond the mere power to purchase, which is expressly given, as are necessarily implied by the appointment of Leslie Jacobs as purchasing agent. Let us test it in this way. Suppose the authority, whether given by word of mouth or in writing, had been limited or expressed in some such words as these: "I hereby appoint Leslie Jacobs as the purchasing agent in Europe and America for the business of tobacco merchant and manufacturer which I carry on at Melbourne, in Victoria." Would such an appointment create by necessary implication a power in Leslie Jacobs to borrow money? I think not. The implied powers of an agent appointed by a trader are very different from the implied powers of a partner in a similar business. Primâ facie, an agent cannot borrow unless he has express authority, as is explained by the judgments in *Hawtayne* v. *Bourne*. (1) And the distinction between the case of an agent and the case of a partner is well illustrated by the judgments in *Brown* v. *Kidger*. (2) But it may be urged that if power to accept bills and give promissory notes in cases other than purchases does

(1) (1841) 7 M. & W. 595. (2) (1858) 3 H. & N. 853.

not apply to borrowing, there is nothing else to which it could apply. I cannot agree. I can quite conceive many debts which might arise in the business of the firm by reason of acts clearly falling within the authority of the agent other than purchases. For instance, the agent might incur a debt for costs to a solicitor, or a debt to an accountant in respect of the examination and adjustment of a trading account; or, to take the case which I understand Farwell J. to put, of an agreed sum payable to the vendor of goods on a contract which the agent has thought it advisable to pay money to be allowed to rescind. In all these cases it seems to me there is money payable which is not in connection with a purchase; and the words "in connection with my said business" seem to give a necessary authority to accept a bill or give a promissory note in such cases; and I therefore cannot agree that there is nothing but "borrowing" which these words can cover. I think that the power of attorney contains no authority to borrow.

I must mention one other argument, which is, as I understand it, this—that the actual practice in the business of this firm shews that the power to borrow is essential to the performance of the duty in England of a purchasing agent acting for an Australian firm, because the business was in fact mainly conducted, if not entirely, by the method of the agent, when he bought goods, taking the invoice and the shipping documents to the London branch of the Australian bank, together with the bill of exchange drawn by him in the name of the firm upon the firm itself; and upon these documents the London branch handed him a cheque for the net amount of the invoice, under a letter of credit given by the Australian bank to the firm and sent by the firm to Leslie Jacobs; and Leslie Jacobs then paid the money into the firm's account in the London and Westminster Bank, and paid for the goods by a cheque in favour of the sellers. I cannot see that this practice shews that a general power to borrow was in any way essential to the conduct of the business. All it shews is that the firm had opened a credit with an Australian bank, who authorized their London branch to advance to Leslie Jacobs the invoice

C. A. 1902 JACOBS v. MORRIS. Vaughan Williams L.J.

price of exported goods against the shipping documents. This was an advance made under the special direction of the principal in Australia, who opened the credit to be operated upon against shipping documents of goods exported to the firm. This practice seems to me to negative rather than to affirm a general power to borrow for the purposes of the business. If Leslie Jacobs had no right to borrow money on behalf of Louis Jacobs, this disposes of the counter-claim so far as it relates to the bills of exchange given in consideration of the loan, but it still leaves the claim, as money had and received to the use of Messrs. Morris, for the 4000*l.* obtained by the cheques of Messrs. Morris which were paid into the account of Louis Jacobs at the London and Westminster Bank. Here, again, I agree with the conclusion at which Farwell J. has arrived.

I agree that Messrs. Morris cannot recover the 4000*l.* as "money had and received" by Louis Jacobs; but I do not base my conclusion, as Farwell J. seems to do, on the ignorance or want of means of knowledge of Louis Jacobs, while the 4000*l.* remained to his account at the London and Westminster Bank, of the fact that it had been paid in to his credit. I prefer to base my decision on the estoppel arising against Messrs. Morris by reason that they had constructive notice, when they lent the money, that Leslie Jacobs had no authority to borrow on behalf of Louis Jacobs, and that it was their conduct in lending the money which enabled Leslie Jacobs to pass the 4000*l.* through Louis Jacobs's account without his knowledge. I am not sure that in *Marsh* v. *Keating* (1) either the House of Lords or the judges whose opinion was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person through whose account a sum of money has passed from responsibility, or that knowledge of the fact is essential to liability. Nothing more seems to me to have been decided than that there the defendants could not rely upon ignorance if they had the means of knowledge. Park J., in delivering the opinion of the judges, says (2): "If they had not the actual knowledge, they had all the means of

(1) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75.
(2) 2 Cl. & F. 289, 290.

knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires." The opinion does not say that knowledge was necessary. The ignorance in such a case seems evidence of negligence, or of the wide limits of actual authority given to an agent appointed by the principal to deal with strangers. I have no doubt myself that the onus in such a case is on the person through whose account the money passed; but, whatever may have been the intention of the decision in *Marsh* v. *Keating* (1), I am not prepared to say that a man who places his account at a bank under the absolute control of an agent, giving him the power to indorse cheques payable to his order, including cheques crossed with the name of his bankers, and to sign cheques drawn on his account, had not the means of knowledge, at all events after a lapse of time, of what was being paid into and paid out of his account by his agent. I see nothing to prevent, in this case, such an audit in London, to say nothing of accounts rendered to Melbourne, as would have rendered these frauds, as I must call them, by Leslie Jacobs impossible. This is sufficient to constitute liability whatever view is taken of the decision in *Marsh* v. *Keating* (1), and this liability arises in the present case, if at all, from the fact that Leslie Jacobs was in fact acting under the general authority actually given by Louis Jacobs when he indorsed Messrs. Morris's cheque, and thus authorized its presentation on behalf of Louis Jacobs by the London and Westminster Bank with whose name it was crossed, and the payment of it to the London and Westminster Bank by the bank on whom Messrs. Morris had drawn the cheque. It seems to me that Louis Jacobs, by so doing, himself lent the proceeds of the cheque to the London and Westminster Bank. It seems to me that that which was done was done under an actual authority; and I doubt whether one need resort to ostensible authority or estoppel to found a charge against Mr. Louis Jacobs. But in my judgment Mr. Louis Jacobs is not liable for this 4000*l.* in an action "for money had and

(1) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75.

C. A. 1902 JACOBS v. MORRIS. Vaughan Williams L.J.

received" to the use of Messrs. Morris, because they cannot be heard to say that they did not know that Leslie Jacobs was receiving from them their cheque in favour of Louis Jacobs for a purpose foreign to that for which Louis Jacobs had given authority to Leslie Jacobs to indorse and to pay into Louis Jacobs's account. If this is so, the loss of Messrs. Morris's money was not caused by an act of Louis Jacobs, but by their own act. It was their own act which enabled Leslie Jacobs to commit the fraud. The only doubt which I have had has arisen from the fact of the prior loans by Messrs. Morris to Leslie Jacobs, which loans (amounting in all, I think, to 3000*l.*) had been discharged in due course by or on account of Louis Jacobs. Messrs. Morris might well say that their course of business, notwithstanding the limits of the power of attorney, held out Leslie Jacobs as an agent of Louis Jacobs with authority to borrow; but I think that the evidence shews that Messrs. Morris doubted the authority of Leslie Jacobs to borrow, and were not in fact misled by any ostensible authority in him arising out of previous transactions. Of course, if Louis Jacobs had received the benefit of the money by its being used to pay his debts, he would pro tanto have adopted the loan and so be liable. Farwell J., however, has found that Louis Jacobs received no benefit from the 4000*l.*, and there is a general statement by both Louis and Leslie Jacobs to this effect, and they were not cross-examined. I suppose, therefore, that this must be taken to be the fact, although an examination of the pass-book seems to me to lead to a contrary conclusion.

STIRLING L.J. I am of the same opinion. I do not think that I can add anything to what has been said by Farwell J. and by Vaughan Williams L.J. on the question as to what is the true construction of the power of attorney which was given by the plaintiff to the defendant Leslie Jacobs; but I think it is right to state how, as it seems to me, the case as to whether the defendants, Messrs. Morris, are entitled on their counterclaim, regarded as an action for money had and received, ought to be treated. [His Lordship then stated the facts as to the payment of the 4000*l.* into the banking account of the

plaintiff's firm with the London and Westminster Bank, laying particular stress upon Arthur Morris's evidence of the conversation above set out between himself and Leslie Jacobs with reference to the proposed loan of the 4000*l.*, and upon the fact that Messrs. Morris, without any further inquiry, agreed to grant the loan on the security of bills accepted by Leslie Jacobs in the name of the plaintiff's firm. His Lordship then proceeded:—]

Farwell J. has found that the plaintiff never was aware of any borrowing by the defendant Leslie Jacobs, and that he never got the benefit of it. If Messrs. Morris had read the power of attorney they would have known that it contained no power to borrow; and also that Leslie Jacobs had power to indorse cheques or draw on the banking account, though only in connection with matters of which the alleged purpose was not one. If, then, the question be, Is it ex æquo et bono that the loss occasioned by the fraudulent act of Leslie Jacobs should be borne by the plaintiff?—it seems to me that it is not. The primary cause of that loss is not anything done or omitted to be done by the plaintiff, but the neglect of ordinary business precautions by the defendants, Messrs. Morris. It is said, however, that the case falls within the decision in *Marsh* v. *Keating*. (1) Farwell J. has held that the principle involved in the opinion given by the judges who advised the House of Lords in that case requires that two things should be established, first, that Messrs. Morris's money went into the plaintiff's account, and, secondly, that the plaintiff knew or had the means of knowledge, while it remained to the credit of that account, that it was the money of the defendants, Messrs. Morris. I agree with Farwell J. in taking this view of *Marsh* v. *Keating* (1), and I also agree with him in thinking that the defendants, Messrs. Morris, have failed in establishing the second point. I think, therefore, that the decision of the learned judge ought to be affirmed.

Cozens-Hardy L.J. I agree that Farwell J.'s judgment ought to be affirmed; and it might be sufficient to say that

(1) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75.

C. A. 1902 JACOBS v. MORRIS. Cozens-Hardy L.J.

I accept the reasons assigned by him for his conclusion. But, as I have had the opportunity of reading the judgment of Vaughan Williams L.J., I desire to say that I adopt his view as to the construction of the power of attorney; and I hold that it did not confer a general power of borrowing.

With respect to the 4000*l.* which was paid into the plaintiff's account at a London bank by the attorney, Leslie Jacobs, it seems that it was all drawn out by Leslie and applied for his own purposes before the plaintiff, who was resident in Australia, knew, or could in ordinary course of business have known, anything about the transaction. Under these circumstances I think the plaintiff cannot be held liable for the sum as money had and received for the use of Messrs. Morris. The truth is that Messrs. Morris must be taken to have had full notice of the terms of the power of attorney, and that it did not authorize the borrowing of this 4000*l.* They advanced the money on the attorney's statement that the power did authorize it. Their omission to read the power was the proximate cause of the loss. As between them and the plaintiff, I think they are more to blame; and it would not be just to hold the plaintiff liable for an act done by his attorney beyond the scope of his authority in favour of Messrs. Morris, who knew the limits of the authority.

Solicitors: *Hollams, Sons, Coward & Hawksley; Robinson & Stannard.*

G. I. F. C.

WHITBREAD & CO., LIMITED *v.* WATT.

[1901 W. 285.]

C. A. 1902 March 22.

Vendor and Purchaser—Contract for Purchase of Land—Contract determined without Default of Purchaser—Lien for Deposit—Power to Purchaser to rescind in given Event—Rescission.

The purchaser of real estate has a lien on the property for his deposit when the contract for purchase is determined without any default on his part, not only when it is determined by reason of the default of the vendor.

A contract for the purchase of land empowered the purchaser to rescind the contract on the happening of a specified event. In exercise of this power the purchaser rescinded the contract:—

Held, that the purchaser had a lien on the land for the deposit which he had paid.

Decision of Farwell J., [1901] 1 Ch. 911, affirmed.

APPEAL from the decision of Farwell J. (1)

By a contract dated January 25, 1897, F. Saunders agreed to sell to the plaintiffs and they agreed to purchase a freehold public-house plot on a building estate belonging to the vendor for 500*l.*, to be paid as to 200*l.* by way of deposit on the signing of the contract, and as to the balance of 300*l.* on the completion of the purchase, with interest, as therein mentioned. The contract contained the following clauses:—

"(3.) The purchase is to be completed as soon as 300 houses shall have been erected on the said estate (but without prejudice to clause 10 hereof) . . . . and the purchasers are to have possession as from the day of completion, when the balance of purchase-money, with interest as aforesaid, is to be paid."

Clause 9 enabled the vendor to cancel the contract, if the purchasers should make any requisition with which the vendor should be unable or unwilling to comply.

"(10.) If 300 houses shall not be erected on the said estate within two years from the date of this agreement, the purchasers shall have the right, by giving seven days' notice in writing to the vendor, to rescind and cancel this agreement,

(1) [1901] 1 Ch. 911.

C. A. 1902 WHITBREAD & Co., LIMITED v. WATT.

and at the expiration of such seven days the agreement shall absolutely cease and determine.

"(11.) In the event of either the vendor or the purchasers cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss, or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit, without interest, shall be returned by the vendor to the purchasers."

The plaintiffs paid Saunders the deposit of 200*l.* on signing the contract. Subsequently Saunders sold and conveyed the whole estate to one Saxelby, who mortgaged it; and in November, 1900, the mortgagees sold and conveyed the estate to the defendant Watt, with notice of the contract of January 25, 1897. The 300 houses had not been built on the estate, nor had Saunders paid or accounted for the deposit to any of his successors in title. On December 3, 1900, the plaintiffs gave notice to the defendant rescinding the contract of January 25, 1897, and claiming payment of the deposit (200*l.*), which was refused.

The plaintiffs then issued an originating summons, claiming (1.) a declaration that, under the contract of January 25, 1897, they were entitled to a charge or lien on the land therein comprised by way of security for the repayment of the deposit of 200*l.*, and (2.) enforcement of the said security by foreclosure or sale.

Farwell J. held that the plaintiffs were entitled to the lien which they claimed.

The defendant appealed.

Brinton, for the defendant. When a contract for the purchase of land is determined otherwise than by the default of the purchaser, he is entitled to recover from the vendor the deposit which he has paid: *Howe* v. *Smith*. (1) In some cases the purchaser is also entitled to a lien upon the land for his deposit. But it is submitted that the two rights are quite distinct, and it does not follow that, because the purchaser can recover his deposit, he is also entitled to a lien. If the vendor

(1) (1884) 27 Ch. D. 89.

is in default it is clearly settled that the purchaser is entitled to the lien, and if the purchaser is in default it is equally clear that he is not entitled to it. But in no case before the present has it been decided that the lien exists when there has been no default on either side. *Rose* v. *Watson* (1) does not govern the present case, nor do any of the other previous decisions apply: *Wythes* v. *Lee* (2); *Ewing* v. *Osbaldiston* (3); *Levy* v. *Stogdon*. (4) And in *Rodger* v. *Harrison* (5) Kay L.J. expressed an opinion that a purchaser is entitled to a lien for his deposit only when "the sale goes off by default of the vendor." The foundation of the doctrine of lien is default on the part of the vendor: *Cornwall* v. *Henson*. (6)

The effect of the contract in the present case was really only to give the purchaser an option to take the land on the happening of the specified event, and the lien never existed.

Hon. Frank Russell, for the plaintiffs. It is admitted that the defendant stands in no better position than did Saunders. The plaintiffs' personal remedy against him for the recovery of the deposit is worthless, because he is bankrupt. It is submitted that the true view of the law is this, that when the purchaser pays a part of his purchase-money a lien at once attaches to the land for the amount paid, and this lien may be enforced in case the contract goes off without any default on the part of the purchaser. The law was in effect thus stated by Kindersley V.-C. in *Wythes* v. *Lee* (7), and *Rose* v. *Watson* (1) really covers the present case. The lien arises on payment of the purchase-money; the conduct of the parties bears only on the question whether the lien can operate. If the purchaser has a right to recover his deposit he has also a lien on the land. The two rights are coincident.

Brinton, in reply. In both *Wythes* v. *Lee* (2) and *Rose* v. *Watson* (1) the vendor was in default. The lien arises under the contract, and it dies with the contract when it is determined by the act of the purchaser.

(1) (1864) 10 H. L. C. 672.
(2) (1855) 3 Drew. 396.
(3) (1837) 2 My. & Cr. 53, 58.
(4) [1898] 1 Ch. 478.
(5) [1893] 1 Q. B. 161, 173.
(6) [1899] 2 Ch. 710, 714.
(7) 3 Drew. 402.

C. A. 1902 WHITBREAD & Co., LIMITED v. WATT.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must fail.

The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. For instance, when an action is brought for money had and received to the use of the plaintiff, it is not true that the money has been so received, but that is the way in which the law states the case in order to do justice. When Lord Westbury in *Rose* v. *Watson* (1) speaks of "a transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase-money paid," and Lord Cranworth speaks of the purchaser being exactly in the position of a mortgagee of the estate to the extent of the purchase-money which he has paid, those expressions are merely verbal vehicles to carry the right which justice demands that the purchaser should have. Having read the report of *Rose* v. *Watson* (1), I must say that, speaking for myself, I agree with Mr. Brinton to this extent, that that decision does not expressly carry the purchaser's lien beyond a case in which the contract has gone off through the default of the vendor. Mr. Brinton admits that the purchaser, immediately upon paying his money, acquires either a lien or an inchoate right of lien for it—I do not think it much matters which you call it. Mr. Brinton admits, as I understand him, that this is a vested right, but he contends that it is defeasible, not only in the case (as every one admits) of the purchaser being himself in default, but also when the purchaser, without any default of the vendor, elects to exercise a power given to him to rescind the contract. It is contended that if the purchaser chooses to give up the contract, not being driven thereto by any default of the vendor, he not only gives up the contract, but also relinquishes the lien or the inchoate lien, which is a creature of the contract. I agree that *Rose* v. *Watson* (1) does not absolutely negative that view, although I think that the illustration given by Lord Cranworth of the mortgage goes a very long way to do so. No one, I

(1) 10 H. L. C. 672.

suppose, would suggest that, if the contract contained a clause giving the purchaser a right to rescind, and the purchaser really had a mortgage on the land for the purchase-money which he had paid, he would lose his mortgage because he elected to rescind the contract.

In this state of things, assuming that *Rose* v. *Watson* (1) has left the point more or less open, we must see what the other authorities say about it. Mr. Russell very properly cited a passage from the judgment of Kindersley V.-C. in *Wythes* v. *Lee*. (2) That learned judge said: "The point most discussed, and the most important, is this abstract question—suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part payment of the purchase-money, and by reason of the vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off and cannot be completed; has the purchaser a lien on the estate for his deposit? That is the most important question." And then he went on to decide that in such a case the purchaser has a lien. That statement of the law covers the present case, and it follows that in my judgment the decision of Farwell J. was right and ought to be affirmed.

Though I have attempted to give my own reasons, I do not intend to depart in any way from or to vary the reasons which Farwell J. has given in his judgment. It seems to me an extremely clear and an extremely forcible judgment, and I am not very sanguine that I have added anything to it by what I have said. I was very much struck by what the learned judge said about the common condition that "If the purchaser makes or insists upon any requisition or objection to the title which the vendor is unable or unwilling to comply with, the vendor may rescind." The learned judge said: "There is no default there, but I venture to think it would not be arguable, and I do not think counsel for the defendant contended, that the purchaser in such a case would have no right to a lien in the same way as if the purchase went off by reason of want of title on the part of the vendor. It is not default. It is rather

(1) 10 H. L. C. 672. (2) 3 Drew. 396, 402.

C. A. 1902 WHITBREAD & Co., LIMITED v. WATT.

misfortune." Mr. Brinton was, I think, so much impressed with that passage that he ceased to argue that the purchaser's lien would be lost in such a case. For the reasons which I have given, and for the very cogent reasons which Farwell J. has given, I think the appeal fails.

STIRLING L.J. I am of the same opinion, and after the judgment of Farwell J. and that of my brother Vaughan Williams, with both of which I agree, I have very little to add. It is, I think, quite true, as Mr. Brinton has contended, that the question of the existence of the purchaser's lien for his deposit arises in the present case in circumstances which differ from those of all previous reported cases. The contract has here been brought to an end, not by any act or default of the vendor, but by reason of the purchaser's exercising a power of rescinding it which is reserved to him by the contract itself. This does not seem to have occurred in any previous case. Nevertheless, in the judgments in the two leading cases on the subject, *Wythes* v. *Lee* (1) and *Rose* v. *Watson* (2), the rule is stated in terms which cover the present case. And, if we look at that which is really the foundation of the doctrine, namely, the desire to do justice as between vendor and purchaser, it appears to me that that reason applies no less forcibly in the present case than in the ordinary case in which the rescission of the contract takes place by reason of some default on the part of the vendor. In a case in which the vendor had rescinded under a power reserved to him, it would, I think, be absolute injustice if the purchaser were not allowed to have a lien for the purchase-money which he had paid, and which was the security on his part for the performance by him of the contract. I think also the justice of the case requires that the purchaser should have a lien when the contract reserves to him a power to rescind.

COZENS-HARDY L.J. I think the lien for the deposit exists so long as, and in every case in which, the right to recover the deposit has not been lost by reason of the misconduct of the

(1) 3 Drew. 396. (2) 10 H. L. C. 672.

C. A. 1902 WHITBREAD & Co., LIMITED v. WATT. Cozens-Hardy L.J.

purchaser. In other words, when the contract goes off either by reason of the default of the vendor, or without any default on the part of the purchaser, the lien becomes operative. It would be shocking injustice if the purchaser's lien were to be lost in the ordinary case of a rescission by the vendor under the common form condition. Such a rescission is not unlawful, is not a breach of contract, and is not any default on the part of the vendor. It would, I think, be equally unjust that the purchaser's lien should be lost when he rescinds the contract under a power to do so reserved to him by the contract itself.

Solicitors: *H. P. Spottiswoode; Martineau & Reid.*

W. L. C.

KEKEWICH J. 1900 *Jan.* 12.

In re WILKINSON. ESAM *v.* ATTORNEY-GENERAL. (1)

[1899 W. 3869.]

Charity—Gift to—Devise of Land on Trust for Sale—"Personal Estate arising from Land"—Right of Trustees to retain Land unsold—Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.

Land was devised to trustees on trust to sell and to hold the proceeds, after making certain payments thereout, upon trust for a charity. The will contained a power to the trustees to postpone sale:—

Held, that the subject-matter of the gift, being "personal estate arising from land," was within the exception from the definition of "land" contained in s. 3 of the Mortmain and Charitable Uses Act, 1891, and that therefore s. 5 of the Act was not applicable, and it was competent for the trustees, without obtaining the leave of the Court, to retain the land unsold after the expiration of one year from the death of the testator.

ADJOURNED SUMMONS.

John Wilkinson of Sheffield, in the county of York, by his will dated July 14, 1893, appointed William Burnett Esam and John William Dawson executors and trustees thereof, and after bequeathing certain legacies and annuities devised and bequeathed all the real and personal estate to which at his

(1) Reported by special request.

KEKEWICH J. 1900 WILKINSON, *In re.* ESAM *v.* ATTORNEY-GENERAL.

death he should be beneficially entitled or of which he should have any general power to dispose beneficially by will, and not thereby otherwise disposed of, unto his trustees thereinbefore named, upon trust that his trustees or trustee should sell the said real estate (including chattels real) and call in, sell, and convert into money such part of his personal estate as should not consist of money, with power to postpone such sale and conversion for such period as his trustees or trustee might think proper, and he directed that the income of his personal estate however invested should from his death be treated as income, and no part thereof should be added to capital, and that until a sale of the said real estate his trustees or trustee might lease the same for any term at the best rent to be reasonably obtained, and that the rents and profits thereof, or of so much thereof as for the time being remained unsold, should after payment thereout of all rates, taxes, costs of insurance and repairs, and other outgoings, be paid and applied as income of his residuary trust estate, and he directed his trustees or trustee, out of the money to arise from the sale and conversion of his said real and personal estate and out of his ready money, to pay his funeral and testamentary expenses and debts and the legacies bequeathed thereby or by any codicil thereto, and to make provision for the payment of the annuities bequeathed thereby during the continuance thereof, and to pay all legacy and succession duties payable under the preceding gifts, and, subject to and after answering and providing for all the other objects and purposes of his will, he directed his trustees or trustee to appropriate the residue of the money as a fund for founding a charitable institution in accordance with the scheme set forth in the schedule to his will, with such additions, variations, and modifications (if any) as his trustees or trustee might think fit to make thereto or therein, and he declared that for all purposes whatsoever, including the relative rights of his heir-at-law and next of kin, in the event of intestacy as to any part of his residuary estate, his real estate should be considered as converted from the day of his death, and the proceeds thereof should be treated for all purposes as if the same had formed part of his personal estate at his death,

and he declared that in all matters relating to the realization of his trust estate, and the mode of managing and dealing with the same before the sale and realization thereof, his trustees or trustee should be entitled to exercise all the rights of an absolute owner over the same. The will comprised a schedule containing details of a scheme for founding a charitable institution for the purpose of providing annuities for females in reduced circumstances residing in Sheffield.

The testator made a codicil to his will dated November 26, 1895, whereby he appointed John Booth to be an additional executor and trustee of his will, and thereby, and by two subsequent codicils dated respectively August 25, 1898, and December 5, 1898, he varied the legacies and annuities bequeathed by the will, but did not in other respects alter his will.

The testator died on December 18, 1898, and his will and codicils were duly proved by the three executors, W. B. Esam, J. W. Dawson, and J. Booth.

The testator died possessed of real estate of the estimated value of about 27,000*l.* Some of the real estate had been sold, but other part remained unsold, and it was stated in evidence that some of the unsold real estate was of such a character that it was difficult at the present time to find purchasers for it, and that it would be extremely undesirable to attempt to force a sale of it.

On November 14, 1899, the executors and trustees of the will and codicils, being desirous of retaining some of the real estate unsold, but being uncertain whether, having regard to the provisions of the Mortmain and Charitable Uses Act, 1891, it was competent for them to do so without the leave of the Court, took out this summons against the Attorney-General asking for the determination of the question whether the direction for sale contained in the 5th section of the Mortmain and Charitable Uses Act, 1891, applied to the land and hereditaments now subject to the trusts of the will and codicils or any of such lands and hereditaments, and, if it did so apply, then that the time limited by the same section for the sale of such of the same lands and hereditaments as yet remained unsold

KEKEWICH J. 1900 WILKINSON, *In re.* ESAM *v.* ATTORNEY-GENERAL.

might be extended for such period or periods as the Court should think fit, and that the costs of this application might be provided for. The summons was brought on before Kekewich J. in chambers, but after some discussion was adjourned into Court. (1)

John Dixon, for the applicants. It is submitted that this land, having been devised by the testator to his trustees on trust for sale, is not subject to the provision contained in s. 5 of the Mortmain and Charitable Uses Act, 1891, requiring that "land" assured by will to or for the benefit of any charitable use shall be sold within one year from the death of the testator. By s. 3 of the Act it is enacted that the expression "land" shall not include "money secured on land or other personal estate arising from or connected with land." It does not say "money arising from the sale of land," but the words are clearly wide enough to include such money. In the present case the subject-matter of the gift in favour of charity is not land, but the proceeds of the sale of land. The case, therefore, is within the exception contained in s. 3, and it follows that s. 5 does not apply.

It is not a devise of land, but a bequest of money arising from land. It may, no doubt, seem strange that Parliament should have enacted that if a testator gives land to a charity it must be sold within a year, or such extended time as may be allowed by the proper authority, but that if, instead of giving the land to the charity, the testator gives the land to trustees on trust to sell and then pay the proceeds over to the charity, the sale may be postponed for more than a year without the consent of

(1) By the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3, "'land' in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed."

By s. 5, "land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners."

the proper authority. But the explanation seems to be that it is contrary to the policy of the law that the charity should be allowed to elect to retain the land in perpetuity, and the Attorney-General would have a right to come to the Court and claim the execution of the trust for sale within a time which was reasonable, having regard to all the circumstances of the case. It would be odd if a testator who wished his land not to be sold were to be able to accomplish that wish by directing that it should be sold. There is no reported case expressly in point, but the case of *In re Hume* (1), and in particular the judgment of Lindley L.J., is instructive as to the general effect of the Act of 1891, and the reason for the definition clause in s. 3 and the repeal of the definition clause contained in the Mortmain and Charitable Uses Act, 1888. But in the year 1893 there was an unreported case of *In re Rev. Philip Brooking*, before North J., which is referred to in Marcy's Forms of Originating Summons, pp. 57, 58. There, as here, land was devised on trust for sale and to pay surplus proceeds to a charity, and the trustee took out a summons asking that the time for sale might be extended, but, the judge being of opinion that the case was not within s. 5 of the Act of 1891, no order was made except that the trustee be at liberty to take his costs out of the estate.

Ingle Joyce, for the Attorney-General. I am really not concerned to offer much argument to the Court, because in this particular case it would seem that some extension of time ought to be allowed, if the case is within the Act. Upon the construction of the Act, I do not see my way to resist the argument on behalf of the applicants, or to contend that this is a case within s. 5 in which leave is required. If the trustees were to continue to hold this land in defiance of the policy of the Act, it would no doubt be open to the Attorney-General to take action; but that state of things has not arisen.

KEKEWICH J., after negativing a suggestion which had been made that he had expressed an opinion in chambers, continued:—I had not formed an opinion, and it is very

(1) [1895] 1 Ch. 422.

KEKEWICH J.

1900

WILKINSON, *In re.* ESAM *v.* ATTORNEY-GENERAL.

difficult to form an opinion at all, except to this extent, that, construing this will strictly, I have no doubt that there is a conversion directed, which the charity might stop; but still it is a conversion so as to give to the charity the personal estate which arises from the sale of land. Whether that was within the intention of the Legislature, or not, I do not know; but under s. 3 of the Act of 1891, personal estate arising from land is excepted from the definition of "land," and, therefore, being excepted from the definition of land, it is not land within s. 5, and the result is that it is not affected by the Act of 1891. Then, under the Act of 1888, repealing the Act of George II., it seems the property may be taken for charity notwithstanding that it was money or personal estate arising from or connected with land—that is to say, impure personalty which the charity could not take under the Act of George II.

I think the proper course is to say that this Court being of opinion, on the true construction of the will, that there is no devise of land as defined in the Act of 1891, s. 3, the Court doth not think fit to make any order on the summons, except as to dealing with costs. In order to clear the title, it was necessary for the trustees to come here and to bring the Attorney-General here, and therefore they must have the costs out of the estate. (1)

Solicitors: *Pilgrim & Phillips, for Watson, Esam & Barber, Sheffield; The Solicitor to the Treasury.*

(1) For the form of the order as actually drawn up, see Seton's Judgments and Orders, 6th ed. p. 1336, Form No. 19.

C. C. M. D.

In re BARNETT'S TRUSTS.

KEKEWICH J.

1902

March 18.

Bona Vacantia—English Fund belonging to Austrian who has died without Heirs—Right of Succession—"Mobilia Sequuntur Personam."

An Austrian who was entitled to a fund in court in this country died in Vienna, a bastard intestate and without heirs. By Austrian law the succession of an Austrian citizen in such a case is confiscated as heirless property by the fiscus. The Austrian Government having claimed the fund:—

Held, that as the right claimed was not in the nature of a succession, the maxim "Mobilia sequuntur personam" did not apply, and that the Crown, by the law of England, was entitled to the fund as bona vacantia.

PETITION.

Under the will and codicils of William Barnett of Old Bracknell, in the county of Berks, and of the city of Vienna, who died on November 22, 1837, Aloysius otherwise Louis Heller, a natural son of the testator, became entitled, subject to the interests therein of two life annuitants, to two sums of 1698*l.* 10*s.* 2*d.* New Consols and 2717*l.* 12*s.* 3*d.* New Consols in court, each of which funds represented the corpus and income of stock respectively set aside and carried over to provide for payment of the two life annuities.

On March 9, 1883, Aloysius or Louis Heller died at Vienna a bachelor, a bastard and intestate, and on April 27, 1900, letters of administration of his personal estate were duly granted by Her Majesty's High Court of Justice at the Principal Probate Registry thereof to the Solicitor for the Affairs of Her Majesty's Treasury and his successors in office for the use of Her Majesty.

The two annuitants died, one on August 8, 1880, and the other on April 25, 1885.

The funds not having been dealt with for fifteen years or upwards, this petition was presented by the Solicitor for the Affairs of His Majesty's Treasury as administrator of the personal estate of Aloysius otherwise Louis Heller, praying that after payment of sums due to the representatives of the deceased annuitants, and subject to due provision being made

KEKEWICH J.

1902

BARNETT'S TRUSTS, *In re.*

for the costs of the respondents, the two sums of New Consols above mentioned might respectively be transferred to the account at the bank of the Treasury Solicitor and the Assistant Paymaster-General for the time being per Act 39 & 40 Vict. c. 18, the Crown's Nominee Securities Account, and that any residue of cash in court and dividends to accrue on the New Consols might be paid to the Paymaster-General Cash Account at the bank.

The petition was served on the official solicitor of the Court, and on Jessy Tyndale Fearon as the legal personal representative of the testator.

On the petition being mentioned to the Court, it was suggested that the Austrian Government might have a claim to the fund, and the matter stood over, with the result that the Finance Minister of the Imperial Royal Austro-Hungarian Government was made a respondent to the petition in order to maintain the claim of the Austrian Government.

In support of that claim there was an affidavit by a Doctor of Laws and advocate duly qualified to practise in the Austrian Courts, from which it appeared that the disposition of and succession to movable property of Austrian citizens was regulated by the General Civil Code for all the German hereditary provinces of the Austrian monarchy, and that that Code contained provisions to the following effect :—

Art. 300 : Immovable things are subject to the laws of the district in which they are situated. All other things, on the contrary, are the same as (1) the person of their proprietor under the same legislation.

Arts. 731 to 750 divide the legal heirs into six lines, namely, (1.) children of the deceased and their descendants, (2.) parents of the deceased and their descendants, (3.) grandparents and their descendants, (4.) great-grandparents and their descendants, (5.) great-great-grandparents and their descendants, and (6.) great-great-great-grandparents and their descendants, and regulate the mode and shares of succession among such six lines.

Art. 751 : The right of inheritance in regard to a free

(1) *Sic* in the affidavit.

inheritable property is limited to these six lines of legitimate relationship. More distant relations are excluded from the legal succession.

Art. 754: Illegitimate children have in regard to the mother, as far as the legal succession in the free inheritable property is concerned, equal rights with the legitimate children. No legal right of inheritance belongs to the illegitimate children in regard to the succession of the father and the paternal relations, and, further, in regard to the succession of the parents, grandfather and grandmother and other relations of the mother.

Art. 756: The right of succession to the property of a child which has remained illegitimate belongs only to the mother; the father, and all the grandfathers and grandmothers and other relatives of the child, are excluded from it.

Art. 759: If neither a relation of the deceased belonging to one of the six lines above mentioned, nor another line appointed by arts. 752 to 756 (relating to certain cases of legitimation and adoption) exists, the whole inheritance falls to the spouse.

Art. 760: If the spouse is no longer alive, the succession is confiscated as heirless property either by the fiscus or by those persons who according to the political ordinances (1) are justified in confiscating heirless estates.

It appeared that, with regard to Austrian citizens who die in Vienna having no legal heirs or spouse, there is not any political ordinance which justifies any person other than the fiscus in confiscating their heirless estates. The fiscus which is alone entitled to confiscate such heirless estates is the Imperial Royal Treasury Office of the Austrian Empire. The official head of the Treasury Office is the Imperial Royal Finance Minister of the empire.

Sir R. B. Finlay, A.-G., Sir E. H. Carson, S.-G., and *R. J. Parker*, for the petitioner. It is submitted that the Crown is entitled to this fund as bona vacantia.

The law of Austria, as stated in art. 760 of the General Civil Code, is that the succession is confiscated as "heirless

(1) *Sic.*

KEKEWICH J.

1902

BARNETT'S TRUSTS, *In re.*

property" by the fiscus, represented here by the Austrian Finance Minister. The right of the State, therefore, is not a right of succession, but a right to confiscate property to which there is no heir. The property now in question is in this country, and the law of this country is that the Crown is entitled to it as bona vacantia. The principle of the law is expounded by Lord Kingsdown in *Dyke* v. *Walford* (1), where it was held that under a charter of Edward III., in reference to the County Palatine of Lancaster, the right to bona vacantia belonged to Her Majesty Queen Victoria in right of her Duchy as being "jura regalia" within the meaning of the charter. And it was said (2) that the origin of the right shews that it must have existed from the foundation of the monarchy; and that it is the right of the Crown to "bona vacantia"—to property which has no other owner. The principle is of general application, and extends to a corporation as well as to a natural person: see *In re Higginson and Dean*. (3) The principle is stated at an early period of our law by Bracton, Lib. 1, c. 12, quoted in Blackstone's Commentaries, vol. i. 4th ed. A.D. 1770, pp. 288, 289, and Kerr's Blackstone, 4th ed. vol. i. p. 272: "And so it came to pass that, as Bracton expresses it, *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.*"

On behalf of the Austrian Government it will no doubt be contended that the State is to be regarded as an heir, and that the law of the domicil must govern the succession. If Aloysius Heller had left children, no doubt the law of Austria, as being the law of the domicil, would have applied, subject, of course, to the rights of English creditors; but that law can have no application at all where the State is claiming to confiscate the property for want of heirs. There are two cases in which the point has been referred to, but not dealt with: *Aspinwall* v. *Queen's Proctor* (4), where the American Consul applied for administration in order that he might pay the debts and remit the balance to the Government of the United States; but the application was refused because it was not proved that

(1) (1846) 5 Moo. P. C. 434.
(2) Ibid. 495.
(3) [1899] 1 Q. B. 325, 329.
(4) (1839) 2 Curt. 241.

there were no relations of the deceased. That case, therefore, decided nothing. The only other case is *In the Goods of Beggia* (1), where administration was granted of the goods of a public functionary of the Emperor of Morocco deceased, to a person specially empowered to take on behalf of the Emperor. That case turned on the law of Morocco, and has no direct bearing on the present case. The question is very fully dealt with by numerous text-writers. As respects the law of France, it is considered in Laurent, Le droit civil international, 1st ed. 1881, vol. vi. pp. 435 to 446. In Westlake's Private International Law, 3rd ed. p. 168, a passage is quoted from Foelix, Traité du droit international privé, sec. 62, in which that writer says that the rule does not apply to certain specified cases, including the confiscation of movables and the "escheat of a movable succession to the public treasury," and adds, "in all these cases the law of the place where the movables are actually found must be applied, for the fiction which has been mentioned"—i.e., the fiction which deems movables to exist in the place of the domicil of the deceased—"gives place to the fact (cesse par le fait)." See also to the like effect Wharton's Conflict of Laws, 2nd ed. secs. 602, 603, dealing with "escheats and caduciary rights"; Mackeldey's Systema Juris Romani, sec. 630; Voet on the Pandects, vol ii. bk. xxxviii. p. 595; and the whole controversy is summarized in the following passage in Bar's Private International Law by Gillespie, 2nd ed. 1892, p. 843, sec. 387: "The question to which State property is to fall where there is no heir, whether to that in which it is situated, or to that to which the last possessor belonged, is dependent upon whether the right of the State to succeed is to be considered to be a right occupatione or a right of consolidation belonging to the feudal superior, or as a true right of succession. In either the first or second case, the property will go to the State where the property is situated; in the last case it will fall to that of the domicile of the deceased, in so far as both States hold the theory of an universal succession, or as the estate is made up of moveables. The theory which is in conformity with modern ideas of law, which is

(1) (1822) 1 Add. 340.

KEKEWICH J.

1902

BARNETT'S TRUSTS, *In re.*

more deserving of our respect, and which undoubtedly now prevails as the theory of the law in Germany, is that, if there is no one nearer in blood to be called to the succession, a man's fellow-countrymen must be regarded as his heirs . . . . Thus the State whose subject and citizen the deceased was, will be entitled to succeed to him. But, beyond Germany, the other rule still prevails, and each State seizes the moveables which happen to be within its borders"; and he refers to Laurent, vi. s. 255, and to Weiss's Traité élémentaire de droit international privé (Paris, 1885), p. 850. Our law regards the representative as continuing the persona of the deceased, so that "the property in the goods shall be in some one and shall not be in suspense": *Graysbrook* v. *Fox* (1); and it is for that reason that the law of the domicil is allowed to govern the succession to movables. But that can have no application to a case where the State or paramount authority is taking, not by way of continuation of the persona of the deceased, but because the property is without an owner; and this is abundantly clear in a case like the present, where not only in the country where the property is situate, but also in the country where the deceased was domiciled, the principle of law by which the State takes is the same. If in one of the countries a different principle prevailed, a more difficult question might arise, because international law depends on reciprocity. But as in this country, so in Austria the State takes, not as "ultimus heres" but "jure regali." It being clear that goods of this kind are taken by the Crown in both countries as bona vacantia, the law of England must apply to the English goods as the law of Austria would to goods in Austria.

Warrington, *K.C.*, and *Adams*, for the Austrian Finance Minister. We submit that by the law which this Court administers this fund belongs to the Austrian Government. In dealing with the movables of a deceased foreigner our Courts adopt the law of the domicil, and the property goes to the person to whom it is given by that law. Here the domicil is admittedly Austrian, and the Austrian law as to succession to movables is that where a man dies without heirs—that is

(1) (1565) 1 Plowd. 275, 279 a, 280.

to say, not leaving him surviving any person within certain limited degrees of relationship—then the State becomes the owner. It matters not that the word used is "confiscate." It is enough that applying Austrian law the Court finds a person who is entitled to the property. The Court is administering the law laid down by this Austrian Code, which by art. 300 adopts the rule "Mobilia sequuntur personam." If there had been a wife of the deceased, it is conceded that the Court would have been bound to give the entire property to her. Why, then, should the Court stop short at art. 759? It is for the other side to establish that an exception from the general rule "Mobilia sequuntur personam" is to be made in a case of this kind. No English authority can be cited in which the existence of such an exception is laid down, nor is there any English treatise in which such an exception is referred to. In Westlake's International Law, at the places where the subject is dealt with (see pp. 93, 95, 130), no such exception is hinted at. He treats the property as devolving upon the person determined by the law of the last domicil, and that person is the Finance Minister, for whom we appear. In the passage cited from p. 168 the learned author is dealing with a different subject, namely, the application of the lex situs to movables, and it is with reference to that that he cites the passage from Foelix. Though he had that passage before him, he does not say or suggest that it represents the law of this country, and the conclusion is that the particular exception indicated was part of the law of France. So in Dicey on the Conflict of Laws, p. 677, r. 179, it is laid down that the distribution of the distributable residue of the movables of the deceased is in general governed by the law of the deceased's domicil at the time of his death, and no such exception as is now suggested is hinted at. The cases cited as to the nature of "bona vacantia" support this view. The English rule which confers a title on the Crown appears to be founded on the undesirability of allowing mere casual occupiers to acquire the ownership. Therefore the Crown is made the owner. If there is a person lawfully entitled to the goods, they cannot be bona vacantia. The propositions of law laid down in the judgments in *Dyke* v.

KEKEWICH J. 1902 BARNETT'S TRUSTS, *In re.*

Walford (1) and *In re Higginson and Dean* (2) are consistent with our contention, and we fully accept them. In the case of *Aspinwall* v. *Queen's Proctor* (3) it was said that if it could be proved that the property had devolved on the American Government the Court would be inclined to grant letters of administration. *In the Goods of Beggia* (4) is in our favour, because it shews that the judge was ready to give effect to the law of Morocco as regulating the succession. Laurent treats the right of the State as a succession. It must be admitted that Foelix in the passage cited does treat this particular case as an exception to the general law; but this view appears to be confined to French jurists, who in other respects are unwilling to give full effect to the rule "Mobilia sequuntur personam." In Savigny's System des heutigen Römischen Rechts, translated by Guthrie, ed. 1869, p. 235, s. 34, pt. iv., it is stated that "caduciary rights (rights to bona vacantia) are always to be regarded as a surrogate of the right of succession, and are therefore, in like manner, regulated by the law of the domicile of the deceased, without respect to the situation of the effects, even of the foreign immovable estate"; and the author proceeds to advert to the question to which fiscus such a claim is competent, i.e., to the fiscus of the domicil or to that of the place where the property is situate, and says that "it must be determined in favour of the fiscus of the domicile, for the same reason which determines the local law, namely, that this right of the fiscus has the juridical nature of a succession, and wants only its name." And that is confirmed by Wharton on the Conflict of Laws, ss. 602, 603, where it is said that the term "caduciary" is applied in the old writers to the wood which falls like a waif on the river, or the acorn that drops from the tree—caduca ligna, glans caduca. In applying the rule "Mobilia sequuntur personam," it is to be observed that the persona of the deceased is continued or treated as being continued, not in the Crown or State or next of kin, but in the legal personal representative, i.e., the executor or administrator. The rule is part of English law, and the universality of its

(1) 5 Moo. P. C. 434.
(2) [1899] 1 Q. B. 325.
(3) 2 Curt. 241.
(4) 1 Add. 340.

application is abundantly shewn by many judgments: see *Doe* v. *Vardill* (1); *In re Ewin* (2); *Bremer* v. *Freeman* (3); *Enohin* v. *Wylie* (4); Story's Eq. Jur. ed. 1892, p. 612. In *Cooper* v. *Cooper* (5) Lord Cairns said that the Statute of Distributions was substantially a legislative will. So here is the Austrian Code. In short, the law of the domicil disposes of this property in every event, and therefore it cannot be bona vacantia.

[They referred also to the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), and to Williams on Executors, 9th ed. p. 370.]

Method, for the official solicitor.

Herbert Robertson, for the personal representative of the testator.

KEKEWICH J. We have had an interesting discussion, and reference has been made to many authorities, including decided cases and text-writers, and I think it may be said that none of those references has been in the slightest degree out of place, or has failed to throw considerable light on the matter under discussion; but, after all, it seems to me that I am brought back to a question which must be decided, in the absence of direct authority, according to the principle which governs English law on this particular subject. Reference has been made to many writers, English and foreign, on what is termed Private International Law. Such a reference is apposite, because in dealing with a question of this kind maxims and general principles have to be considered, and the exposition of them by text-writers is important, and is always accepted as a guide. But it is admitted on all hands that these writers fail to deal in an authoritative manner with the particular question which I am called upon to decide. There are, no doubt, dicta going to this—that in a case where a man dies "heirless" (I intentionally use the expression in the affidavit for the respondents) his personal property must go in the manner indicated

(1) (1826) 5 B. & C. 438, 451; 51 R. R. 139.
(2) (1830) 1 C. & J. 151, 156.
(3) (1857) 10 Moo. P. C. 306, 358.
(4) (1862) 10 H. L. C. 1, 19.
(5) (1874) L. R. 7 H. L. 53, 66.

KEKEWICH J. 1902 BARNETT'S TRUSTS, *In re.*

by the law of the domicil of the deceased. There are some dicta which are tolerably clear and apposite, but they do not profess to lay down any general proposition. In each passage cited to me I think it is fair to say that the statement of law was given with a modification indicating the possibility of the application of a different rule elsewhere. The respondents' argument is that this case is governed by the old maxim, which is embodied in the English law and is found repeated in one form or another by all the text-writers, to the effect that "Mobilia sequuntur personam." It is contended that this maxim is applicable to the case of a man dying heirless, and leaving movable property situate outside his country of domicil. The maxim "Mobilia sequuntur personam," is translated over and over again by text-writers, British as well as foreign, and reduced to a definition and rules, and they are all more or less in the same form and to the same effect. I do not know where it is better given than in Dicey's Conflict of Laws, r. 179, on p. 677. That rule must be read together with the previous rule 178, as to payment of debts, with which we are not now concerned, it being admitted on all hands that the debts of the intestate would have to be paid according to the law of the country in which the property is found. The debts being out of the way, it is necessary to deal with what Mr. Dicey calls the distributable residue, and he lays down this rule: "The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicil (lex domicilii) at the time of his death." On the next page he describes what he means by "the law of the deceased's domicil." I need not read the passage, because it may be taken that we all mean the same thing when we use that expression, but it seems to me to illustrate the meaning and extent of the rule. It is the distribution of the distributable residue. When you come to the distribution of the property of the deceased, then you must follow the law of the domicil of the deceased, whether it is according to some statute, or what we call the common law, whether it is among relations, because they claim in that character, or among persons entitled under a will: in whatever aspect it is looked

at, the distribution must follow the law of the domicil. But in each case it is a distribution, such as is meant by "Mobilia sequuntur personam." Here I have to deal with a case where there is no distribution at all, and where there is really no persona to follow. Mr. Warrington's argument is that the Crown of Austria or his own client, the Finance Minister, coming in and obtaining administration to the estate of the deceased, is for all intents and purposes the deceased person's representative—that he is, in effect, the "legal personal representative" of the deceased. But that is only the technical language of our law. He does not represent the deceased at all, except that by our law he is put in his place to defend actions by creditors or by persons claiming the estate against him. But he does not in any other sense represent the deceased. He does not claim through the persona of the deceased. He claims what is termed the "glans caduca," not the acorn on the tree, but the acorn which has fallen on to the ground from the tree. There is no possibility of getting at this property through the deceased. It is because there is no one who can claim through the deceased that the Crown steps in and takes the property. The Crown takes it because it is, as it is described in the cases, bona vacantia. It is property which no one claims—property at large—there is no succession. The Crown does not claim it by succession at all, but because there is no succession. All the learning on the subject of bona vacantia is to be found in the case of *Dyke* v. *Walford* (1), which has been cited. I need not refer to it in detail. The contest there was of a peculiar character, and the judgment delivered by Lord Kingsdown deals with the duties and powers of the Ordinary and negatives any claim on the part of the Church. But the principle was that the right to take that which belonged to no one appertained to the Crown, as jura regalia; and if that is really the sound view, I cannot see how, according to English law, there can be a right in any one else to say that this maxim applies, and that there is to be a distribution—a settlement of rights—according to the domicil of the deceased person, who in effect by dying heirless has made his domicil immaterial. Those considerations seem to me to conclude the question,

(1) 5 Moo. P. C. 434.

KEKEWICH J.

1902

BARNETT'S TRUSTS, *In re.*

because I am not dealing here with any case in which another claimant desires to enforce a different rule. It may be—I do not say that it will be—but it may be that hereafter, if a case arises where there is a conflict between the law of two countries on the subject, a more difficult question may have to be decided on the ground of international comity. With that I have not to deal, because it is perfectly clear on the affidavit which states the Code that between the law of Austria and that of England there is no real difference on this subject. Several articles of the Code have been referred to in argument, but it is really No. 760 which is directly applicable. The words with which it commences, "If the spouse is no longer alive," must be read in connection with the immediately preceding article, which gives the whole inheritance to the spouse in certain contingencies there mentioned. Those words, "If the spouse is no longer alive," are equivalent to "if there be no person to claim as heir," and in that event "the succession is confiscated as heirless property." The great difficulty in the case is in dealing with the poverty of language, or at any rate of the English language. "Confiscated" is a word capable of being used in many senses. In the ordinary sense it applies where the Crown intervenes, not to take property because it is vacant, but to take by way of penalty in exercise of sovereign rights different from those which are asserted in a case like this. But here the word does not mean "confiscated" in the sense of taking by way of penalty. It is taken, or assumed by the State, as its own property. What the Code says is that it is confiscated as heirless property—that is, as property which we call in England bona vacantia. It is property to which there is no heir, because neither country admits the right of the passing traveller, and therefore the property must fall to the Crown as a matter of right in the exercise of its sovereign power. The rest of art. 760 is really of no importance for this purpose. It only says, "either by the fiscus or by those persons who according to the political ordinances are justified in confiscating heirless estates," that is to say, by the person appointed for the purpose, whether it be the Minister of Finance in one country or the Solicitor to the Treasury in another.

The provision of the Code, therefore, seems to me to be

precisely on the lines of our law as to bona vacantia. When there is no heir, some paramount authority steps in and claims it, not as against any one, but because there is no one to claim it at all. But then it is urged that it must be remembered that the law is different in Austria as to succession from what it is here—that there is a limit to the persons to take. I notice that argument because it was urged, but I fail to see the force of it. What matters it, looking at it from the Austrian point of view, that according to English law persons who would be excluded in Austria, as, e.g., those related by half-blood, are allowed to come in? It must come back to this: Under what circumstances does no succession arise? Under what circumstances is the paramount authority entitled to come in and say, "I take because there is nobody else to take"? That seems to me to be the whole question, and it matters not the least whether any description of person is allowed to come in or not, or what is the limit to those by law entitled. When once the principle which I have endeavoured to explain is arrived at, the large majority of the passages and dicta which have been quoted can be construed, regard being had to the unfortunate poverty of language which makes us speak of "succession" when there is no succession, simply because there is no other expression which fits in so well with ordinary parlance. An excellent illustration was given of that in the opening of the case, and is to be found in several of the books (I think in *Dyke* v. *Walford* (1) more than once), where the Crown is spoken of as the "ultimus heres." It is not only not English, but it is perfectly inaccurate, and yet like many other inaccurate expressions it is thoroughly well understood, and is very convenient. I think the principle is that which I have stated, and that it must govern this case. I therefore hold that the Crown is entitled to this fund.

Solicitors: *Solicitor to the Treasury; Tatham & Lousada; The Official Solicitor; Francis Fearon.*

(1) 5 Moo. P. C. 434.

C. C. M. D.

FARWELL J.

1902

Feb. 20.

WALES *v.* CARR.

[1901 W. 5755.]

Mortgage—Redemption—Mortgagee's Costs—Costs of negotiating Loan and preparing Mortgage Deed.

A mortgagee's solicitor's costs of negotiating the loan and preparing the mortgage deed become, on completion of the transaction, a simple contract debt at common law due to the mortgagee by the mortgagor; and cannot be added by the mortgagee to his security as part of the costs, charges, and expenses properly incurred under or by virtue of his mortgage.

In January, 1901, the defendants took a first mortgage of certain freeholds. On this occasion their solicitors' costs of negotiating the loan, investigating the title, and preparing the mortgage deed—amounting to 28*l.* 8*s.*—were not, as is usual, deducted from the loan on completion of the transaction, but were subsequently paid by them to their solicitors.

In May, 1901, the plaintiffs became transferees of a second mortgage on the same property, and in September, 1901, received notice from the defendants of their intention to exercise their power of sale. Thereupon the plaintiffs agreed to redeem the defendants and to take a transfer of their security. The defendants then claimed that the plaintiffs were not entitled to redeem except upon payment of the 28*l.* 8*s.* above mentioned as part of the costs of the first mortgage. The plaintiffs, by arrangement with the defendants, paid this sum under protest and then brought this action, claiming a declaration that, on redemption by them of the first mortgage, the defendants were not entitled to charge the 28*l.* 8*s.* for their costs of the first mortgage. It was admitted that there was no direct authority on the point.

S. R. Earle, for the plaintiffs. These costs cannot be added by a mortgagee to his security as part of his costs, charges, and expenses: *Gregg* v. *Slater* (1); *Wyatt* v. *Cook* (2); *Bolingbroke*

(1) (1856) 22 Beav. 314; 2 Jur. (N.S.) 246. (2) W. N. (1868) 237.

v. *Hinde* (1); Cordery on Solicitors, 3rd ed. p. 71; Fisher on Mortgages, 5th ed. p. 897. In *National Provincial Bank of England* v. *Games* (2) these costs were allowed; but in that case there was first an equitable mortgage with a covenant to get in the legal estate. When a mortgage is completed these costs become a simple contract debt payable by the mortgagor to the mortgagee: *Ex parte Firth* (3), and are usually deducted from the loan; but if not then paid they cannot be added to the mortgage debt.

Cozens-Hardy, for the defendants. These costs become a debt by virtue of the mortgage deed coming into existence, and under and by virtue of the mortgage are recoverable as part of the costs, charges, and expenses of the mortgagee properly incurred, which a mortgagor must pay on redeeming. *Gregg* v. *Slater* (4) is distinguishable. There the mortgagee was a member of the firm of solicitors to whom the costs were due. *Wyatt* v. *Cook* (5) is more fully reported in the *Law Journal* (6), and is no authority for the plaintiffs. The text-writers are in conflict on the point: Robbins on Mortgages, p. 1191; Ashburner on Mortgages, p. 304. In *Nicholson* v. *Jeyes* (7) these costs were provided for. [He also cited *Field* v. *Hopkins* (8) and *Ex parte Fewings*. (9)]

S. R. Earle, in reply.

FARWELL J. This is an application by the transferees of a second mortgage, and it is to be treated as if it were an application in a redemption action. All outstanding matters between the parties have been settled except a sum of 28*l*. 8*s*., representing the costs incurred in and about the preparation of the mortgage deed. These are costs which the mortgagee is entitled to recover from the mortgagor at common law, if and when he has paid them, under the implied contract of indemnity between the parties arising out of the relationship between them. I take the law to be as stated by Jessel M.R. in *Ex parte Firth*. (3)

(1) (1884) 25 Ch. D. 795.
(2) (1886) 31 Ch. D. 582.
(3) (1882) 19 Ch. D. 419.
(4) 22 Beav. 314; 2 Jur. (N.S.) 246.
(5) W. N. (1868) 237.
(6) L. J. N. of C. (1868) 75, 217.
(7) (1853) 22 L. J. (Ch.) 833.
(8) (1890) 44 Ch. D. 524.
(9) (1883) 25 Ch. D. 338.

FARWELL J. 1902 WALES v. CARR.

He says (1): "There is a great distinction between a sum of money being advanced on the terms of the lender paying out of it a debt due by the borrower to a third person, a portion of that sum being handed back again to the lender or handed over by him to another person who is a creditor of the borrower, and a sum of money being retained for that which is not truly a debt until after the transaction itself is completed, that is, a sum of money which consists of the expenses of the transaction itself. When a mortgage is completed the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitor for those expenses. The mortgagor is liable to pay over to the mortgagee what he pays to his own solicitor, but there is no debt until the transaction is completed." It is quite plain that there he is using advisedly the technical terms of common law, "debt" and "liability," and that this is a liability of the mortgagor to indemnify the mortgagee against the costs of the mortgage he has to pay to his own solicitor after the mortgage has been completed. That is the common law liability. Now it is obvious that those costs are in no way included in terms in the mortgage deed itself. That extends to the payment of the principal sum and interest; and costs in the action are given by the Court, whether the action is on the covenant or for foreclosure. Further than that, there are certain costs, charges, and expenses not recoverable at common law, but which in a proper case are given in Chancery as a term of redemption; that is to say, the mortgagee's estate having become absolute at law, the mortgagor is allowed to redeem only on terms. Now Mr. Cozens-Hardy has called my attention to the case of *Ex parte Fewings* (2), in which there are these two interlocutory observations of Cotton L.J., which I will read. He says (3): "Can she maintain an action for them"—that is, the costs relating to the mortgage—"against the mortgagor? That is quite a different thing from recovering them as part of the price of redemption." And a little later he says: "I do not see how costs incurred by a mort-

(1) 19 Ch. D. 427. (2) 25 Ch. D. 338.
(3) 25 Ch. D. 348.

gagee for the protection of the mortgaged property could be the subject of an action for debt against the mortgagor." And in his judgment he says (1): "Fry L.J. reminds me that, independently of the 10*l.* for work which is said to have been done at the request of the debtor, there are some items amounting to 5*l.* 12*s.* for work done by the direction of Mrs. Nutting, the mortgagee herself, and it is said that she can claim those items as a debt due from the debtor. In my opinion that is erroneous. No doubt, if the debtor, in his character of mortgagor, claimed to redeem the mortgage, the Court would not grant him that which originally was an indulgence, a departure from the strict tenor of his legal right, without imposing upon him the condition of paying the mortgagee, not only the debt which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in her position as such. But that is an entirely different thing from saying that an action of debt could be maintained by the mortgagee against the mortgagor for those expenses. It is said that the mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs, but I am of opinion there is no such contract, but as a condition of redemption that a Court of Equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee." The Lord Justice distinguishes there between costs, charges, and expenses, which are not common law debts at all, and those costs which are common law debts, including those costs which are necessarily incident to the creation of the position of the mortgagee as such. Now, the proposition is stated by Lord Cottenham in *Dryden* v. *Frost* (2), cited in *National Provincial Bank of England* v. *Games* (3), thus: "The Court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at

(1) 25 Ch. D. 352.

(2) (1838) 3 My. & Cr. 670; 45 R. R. 344.

(3) 31 Ch. D. 592.

FARWELL J. 1902 WALES v. CARR.

law or in equity. . . . . In *Detillin* v. *Gale* (1) Lord Eldon says that he ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonably with respect to such rights as his mortgage title gives him." Those are costs which come out under the common form account in a foreclosure action as costs, charges, and expenses. But this account certainly does not include a simple contract debt which is not due "under and by virtue of the security," but by reason of the preparation and execution of the deed of security. Those are costs which are due from the mortgagor to the mortgagee under an implied covenant of indemnity at common law. If it were not so, it would be in effect tacking to the security a simple contract debt at common law, which would be contrary to all principle. The fact is, that this question rarely arises in practice, because in the great majority of cases the mortgagee or his solicitor takes care to retain these costs out of the mortgage moneys before they are handed over. But it is certainly somewhat remarkable that this question arises for decision for the first time in the year 1902. The text-books apparently say it is doubtful. *Gregg* v. *Slater* (2) was relied on by Mr. Earle; but that case is not very clear. I have come to the conclusion, looking at the report in the *Jurist*, that really it is no decision on the subject at all. The case of *Wyatt* v. *Cook* (3), as reported in the *Weekly Notes*, is unintelligible, but as reported in the *Law Journal* Notes of Cases it is quite plain. There a mortgage of the reversion of an expectant heir was set aside on the usual grounds, and the mortgagee had to pay the costs. In the Court of Appeal the mortgagor offered to pay them, but there was no decision one way or the other. *Nicholson* v. *Jeyes* (4), which was relied on by Mr. Cozens-Hardy, was an administration suit, and an order was made directing certain costs to be raised by mortgage of certain property, and providing that the mortgagee should be allowed his costs, charges, and expenses. A gentleman came in who was willing to lend the money. His solicitors said that

(1) (1802) 7 Ves. 583; 6 R. R. 192.
(2) 22 Beav. 314; 2 Jur. (N.S.) 246.
(3) W. N. (1868) 237; L. J. N. of C. (1868) 217.
(4) 22 L. J. (Ch.) 833.

under the order he would not get their costs of preparing the deed or counsel's opinion upon it, and the gentleman was not prepared to advance the money on those terms. The matter was brought before the Vice-Chancellor, who declined to give any direction. Then it was mentioned to the Lords Justices. Mr. Cozens-Hardy relied on the statement of Knight Bruce L.J., which was very short, and was not addressed to the argument on the greater part of the case at all. He says: "I consider the mortgagee must have all his reasonable costs to which, according to the usual course of practice out of Court, he, as mortgagee, would be entitled." That is a very curt way of stating it, but it really contains in it the whole truth. There was no mortgage; the Court had directed a mortgage of the property they were administering; there was therefore no one with whom any contract to pay the costs of the mortgage could be implied; but the Court had directed that the mortgagee was to have his costs, charges, and expenses, and the Lord Justice considered that this included all such costs, charges, and expenses as he would have got from the mortgagor or against the plaintiffs in an ordinary mortgage transaction. Turner L.J. says expressly: "As the order has directed that the mortgagee shall have his costs, charges, and expenses, the words 'including his reasonable and proper charges of settling the security' may be added." He obviously did not think that "costs, charges, and expenses" were necessarily sufficient; he the mortgagee was seeking to have the costs of the mortgage, and he added words which would be unnecessary, if Mr. Cozens-Hardy's argument were right. But in fact, when you come to consider that these costs are recoverable immediately on the execution of the deed, and on payment by the mortgagee to his own solicitor, and that no other costs, charges, and expenses can be recovered at law which are chargeable only against the property in a foreclosure or redemption action, the distinction between the two seems to come out very clearly. It seems to me, therefore, notwithstanding the dearth of authorities, that on principle it is clear that a mortgagee cannot charge against the mortgaged property, by way of tacking or otherwise, the costs of preparing

FARWELL J. 1902 WALES v. CARR.

the mortgage deed which he is entitled to recover—having paid them—under the implied contract against the mortgagor. The result is that I find for the plaintiffs.

Solicitors: *Rooks, Spiers, Wales & Ward; Attenborough & Son.*

H. L. F.

FARWELL J. 1902 *March* 18.

FINCHLEY ELECTRIC LIGHT COMPANY *v.* FINCHLEY URBAN DISTRICT COUNCIL.

[1901 F. 1470.]

Local Government — Street — Urban Authority — Turnpike Trustees — Road originally Conveyed in Fee — Vesting in Urban Authority — Overhead Wires — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Turnpike Roads Act*, 1822 (3 *Geo.* 4, *c.* 126)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 11, 64.

When the site of a road was originally conveyed to turnpike trustees in fee simple for the purpose of making a road under the Turnpike Roads Acts, and the road has afterwards become a highway, the whole estate which was vested in the trustees, i.e., the fee simple, vests under the Public Health Act in the urban authority, and they are entitled to prevent electric wires being carried over the road at any height whatever.

Wandsworth Board of Works v. *United Telephone Co.*, (1884) 13 Q. B. D. 904, distinguished.

THE plaintiffs in this action were a limited company having for one of their objects the supply of electricity in the district of Finchley. They had not obtained a provisional order or other statutory authority for that supply. The defendants were the urban district council for the district of Finchley; they had in the year 1899 obtained a provisional order from the Board of Trade empowering them to undertake the supply of electricity within their district, but they had done nothing under this order except acquiring a site for a generating station.

The plaintiff company on October 1, 1901, carried two guide or supporting wires across a road in the defendants' district, called Regent's Park Road, at a height of thirty-four feet. These wires were intended to support a cable carrying a supply of electricity to the house of one of the plaintiffs' customers.

The defendants cut the wires, and threatened to cut any wires which the plaintiffs should carry over any street within their district. The plaintiffs brought this action for an injunction to restrain the defendants from cutting or interfering with the wires erected by the plaintiffs. On October 16, 1901, the vacation judge granted an interim injunction. The defendants put in a defence, alleging that the site of the Regent's Park Road was vested in them in fee simple, and, by a rejoinder delivered in February, 1902, disclaimed any intention to prevent the plaintiffs carrying wires over any roads the fee simple of which was not vested in the council.

This was the trial of the action, and the only question for decision was whether the defendant council was entitled to the fee simple of the Regent's Park Road at the place where the wires crossed it.

The Regent's Park Road was originally constructed by turnpike trustees, appointed under a local Act of Parliament passed in 1826 (7 Geo. 4, c. xc. Loc. & Pers.), for making a road "from St. John's Chapel in the parish of St. Marylebone to the north-east end of Ballard's Lane abutting on the North Road in the parish of Finchley." The site or part of the site of the road at the point where the plaintiffs' wires crossed it was originally glebe land, and was on November 7, 1828, conveyed to the trustees in fee simple by the rector of the parish, under the powers of the Turnpike Roads Act of 1822 (3 Geo. 4, c. 126).

The question whether the fee so conveyed to the trustees had become vested in the defendants depended on the construction of certain sections in several Acts of Parliament, the effect of which is as follows:—

The Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 84, enacts "that it shall be lawful for the trustees or commissioners of any turnpike road to treat, contract and agree with the owners of and persons interested in any lands, tenements, hereditaments and premises, with their appurtenances, which they shall deem necessary to purchase for the purpose of widening, diverting, altering and improving such road, for the purchase thereof"; and the same section empowers "bodies

FARWELL J. 1902 FINCHLEY ELECTRIC LIGHT COMPANY v. FINCHLEY URBAN COUNCIL.

politic" and limited owners to sell and convey unto the trustees and commissioners "all such lands, tenements, hereditaments or premises, or any part thereof, for the purposes aforesaid."

The Turnpike Roads Amendment Act, 1827 (7 & 8 Geo. 4, c. 24), s. 18, enacted that all minerals which should be found under any turnpike road should be reserved to the persons, &c., who would have been entitled thereto if the Act for making such road had not been passed.

The Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), s. 9, provided that certain Acts therein named for regulating or making turnpike roads, including the said Act 7 Geo. 4, c. xc. (Loc. & Pers.), and an Act 13 & 14 Vict. c. ciii. (Loc. & Pers.), for continuing the same and paying off the debt due on the said road, should continue until the several debts should be paid off and no longer. Sect. 10 of the same Act provided that any highway which thereafter might cease to be a turnpike road should thereupon become repairable by the inhabitants at large.

The turnpike gates had been removed in 1852, and the Court inferred that the debt had then been paid off.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149, enacts that "all streets, being or which may at any time become highways repairable by the inhabitants at large within any urban district, and the pavements stones and other materials thereof, and all buildings implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority."

The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13, provided that any road which had after December 31, 1870, ceased to be a turnpike road should be deemed to be a main road, and that one-half the expenses of its maintenance should be borne by the county authority.

The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11, provides that main roads shall be maintained and repaired by the county council, unless the urban authority claim, as therein mentioned, to retain the powers and duties of maintaining and repairing such roads; and that (sub-s. 6) a main road and the

materials thereof, and all drains belonging thereto, shall, except where the urban authority retain the powers and duties of maintaining and repairing such road, vest in the county council.

Sect. 64 of the same Act provides that "all property of the quarter sessions of a county, or held by . . . . any justice or justices of a county, or treasurer, or commissioners, or otherwise for any public uses and purposes of a county, or any division thereof, shall pass to and vest in and be held in trust for the council of the county."

Sect. 68 defines county purposes to mean all purposes declared by this or any other Act to be general county purposes.

The defendants had duly claimed to retain the duties of maintaining and repairing the Regent's Park Road.

The district of Finchley had originally been included under the district of the rural sanitary authority of Barnet, but had been made an urban sanitary district in 1878.

Jenkins, *K.C.*, and *Buckmaster*, for the plaintiffs. The defendants have now limited their claim to roads the soil of which is vested in them in fee. The burden is on them to shew that the soil of the road in question is so vested.

Upjohn, *K.C.*, and *Lyttelton Chubb*, for the council. In this case the site of the road was conveyed to the turnpike trustees in fee simple. That differentiates this case from the whole class of cases, from which *Tunbridge Wells Corporation* v. *Baird* (1) is the leading example, which have decided that s. 149 of the Public Health Act only vests in a local authority, under the word "street," so much space above and below the surface as was necessary to enable them to discharge their duties. Those cases do not apply to a case where the fee was originally vested in turnpike trustees who were the predecessors in title of the council. The council have all that was vested in the trustees. The reasoning upon which all that class of cases depends is that on general principles the Legislature cannot be supposed to have taken away from the owners without compensation anything more than was necessary.

(1) [1896] A. C. 434.

FARWELL J. 1902 FINCHLEY ELECTRIC LIGHT COMPANY v. FINCHLEY URBAN COUNCIL.

What is included in the word "street" is a question of fact in each case. In the case of an ordinary highway, the public never had anything except the right of road. Under Turnpike Acts the trustees always bought the fee simple, except the minerals, which were specially reserved to the owners by 7 & 8 Geo. 4, c. 24, s. 18.

Rolls v. *Vestry of St. George the Martyr, Southwark* (1), and *Wandsworth Board of Works* v. *United Telephone Co.* (2) were decided on the same grounds, and are distinguishable in the same way.

Even if we are wrong on this point, the legal estate in such part of the soil as is not vested in the council must be held by some one as a bare trustee for the public. The council are in possession, as representing the public, and that possession is sufficient to enable them to maintain an action of trespass.

The plaintiffs have no statutory right to supply electricity or to carry these wires across the road, and in the absence of such right they cannot maintain an action against the plaintiffs for removing them : *National Telephone Co.* v. *Constables of St. Peter Port.* (3)

Jenkins, K.C., and *Buckmaster*, for the plaintiffs. The fee simple is not vested in these defendants. It is not necessary to consider where it is, for the burden of proof that it is in the defendants is on them ; but it may be in the real representative of the last surviving turnpike trustee, or in the county council under s. 64 of the Local Government Act, 1888, or perhaps in the adjoining owners.

The defendants must claim under s. 149 of the Public Health Act, 1875, and the central point is what is the meaning of "street" in that section. It is settled by the cases that it means a certain physical thing—that is, the surface on which people walk, and so much above and below as is necessary to enable the local authority to do their duty ; and the definition is arrived at without reference to the question who is entitled to the space of which the street forms a stratum. In *Coverdale* v. *Charlton* (4) the fee was probably in the lord of the

(1) (1880) 14 Ch. D. 785.
(2) 13 Q. B. D. 904.
(3) [1900] A. C. 317.
(4) (1878) 4 Q. B. D. 104.

manor, but the Court has not in any case considered what the title to the fee was, and it cannot make any difference. The effect of *Wandsworth Board of Works* v. *United Telephone Co.* (1) is that the Act must be read as if the definition in Lord Bramwell's judgment in *Coverdale* v. *Charlton* (2) were contained in the definition clause in the Act. The construction cannot be altered according to the circumstances of each case. But in this case, at the time when the Public Health Act came into operation, the road was and had been for some years a highway repairable by the inhabitants at large. The effect of s. 149 could not be different in this case from any other.

The turnpike trustees were never trustees of the fee for the public; neither the Act nor user could give the public an interest in anything but the surface. When the turnpike trust expired there was a resulting trust for the former owners, subject to such rights as the public had to use the road under the Annual Turnpike Acts Continuance Act, 1870, or otherwise. In *Reg.* v. *Thomas* (3) it is stated by Coleridge J. that the owner of a road taken for the turnpike road could resume it on cesser of the trust.

But if we are wrong on this point and the turnpike trustees were trustees for public purposes, then so much of the fee in the land as was not part of the street vested in the county council under s. 64 of the Local Government Act, 1888. The retainer by the urban council, under s. 11, of the right and duty to repair and maintain the roads could not vest anything in them which was not already vested in them by the Public Health Act.

FARWELL J. This case raises the old vexed question of the meaning of the words "vest" and "street" in s. 149 of the Public Health Act, 1875. I take it to be now settled that "vest" means that property in something passes, and the question is what is the meaning of the word "street," which is the thing the property in which does pass. I think, as the result of the authorities, the true view is that it means so much of the land in question as is required for the purposes of the street

(1) 13 Q. B. D. 904. (2) 4 Q. B. D. 104.
(3) (1857) 7 E. & B. 399.

FARWELL J. 1902 FINCHLEY ELECTRIC LIGHT COMPANY v. FINCHLEY URBAN COUNCIL.

under the particular circumstances of the given case. That, I think, reconciles all the decisions and is consistent with the reasoning on which the decisions are founded. Take, for example, the case of the *Tunbridge Wells Corporation* v. *Baird*. (1) Lord Halsbury says (2): "It is intelligible enough that Parliament should have vested the street quâ street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." Later on he says (3): "For that purpose it would be intelligible. For any other purpose it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued of not taking private rights without compensation." Lord Herschell says (4): "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." And to the same effect is the statement of James L.J. in *Rolls* v. *Vestry of St. George the Martyr, Southwark* (5): "It seems to me very reasonable then to interpret this enactment in a way which gives everything that is wanted to be given to the public authority for the protection of the public rights without any unnecessary violation of the rights of the landowner, and to say that according to its true construction what is to vest is not those pieces of property which have now got the name and are distinguished by the name of streets, but those things which now, or at any time hereafter, shall for the time being be streets and highways within the district." Now, the circumstances of this case are unlike those in the cases which have come before the Court, and they give rise, no doubt, to some difficulty. In my opinion it is the duty of the Court, so far as possible, to construe an Act of Parliament reasonably so as to give effect to its provisions, and not to reduce matters to a deadlock if it can possibly be avoided. [His Lordship read shortly the conveyance to the turnpike trustees and the 84th section of

(1) [1896] A. C. 434.
(2) Ibid. 437.
(3) [1896] A. C. 439.
(4) Ibid. 442.
(5) 14 Ch. D. 785, 796.

the Turnpike Roads Act (3 Geo. 4, c. 126), set out above, and continued:—]

The commissioners and trustees, therefore, were empowered to purchase for the purposes of the road a piece of land in fee simple, i.e., usque ad cœlum and usque ad medium terræ, and that land was so conveyed to them.

Now, it is said that by virtue of the various Acts of Parliament under which the road became disturnpiked in 1872 and became a main road, then or shortly afterwards, although the fee was in accordance with the terms of the Act of Parliament required for the purposes of the road, and the land so acquired was used for the purposes of the road, I am to construe the Act of Parliament so as to vest in the local authority, the present defendants, not the whole of the land acquired and required for the purposes of the road, but only so much as was required according to the reasoning of the Courts, in other cases, where the land was not acquired at all, but was dedicated to the public by the adjacent owners, and I am accordingly asked to hold that the legal estate in a portion of the land, namely, that above the limits required for the passage of passengers along the road and that below the surface so far down as is not required for the purpose of the road, is vested in somebody else.

It appears to me that the Act of Parliament, when it says that the streets or roads shall vest in the local authority, has said that so much of the land as is required for the purpose of the road shall vest in them, and further that when another Act of Parliament has authorized trustees to acquire land in fee simple for the purposes of the road, it is impossible for any Court to say that the whole fee simple was not so acquired and required. Consequently in this particular case I have referred to the circumstances of the case, as did all the Courts in the cases that have come before them heretofore. They have seen what was required for the purposes of the road. I have got something more than physical requirements, because I have got the Act of Parliament authorizing the acquisition for the purposes of the road, and, that being so, it appears to me I am bound to say that this land was acquired and required for the

FARWELL J. 1902 FINCHLEY ELECTRIC LIGHT COMPANY v. FINCHLEY URBAN COUNCIL.

purposes of the road. If it were not so the difficulty arises—in whom is the legal estate left?

It has been suggested that somehow or other it has got into the adjacent owners and has been rededicated. I confess I am unable to follow that argument. The legal estate was conveyed out and out in fee to the trustees, and the only person in whom it may be, so far as I can see, is the last surviving trustee or the real representative of such last surviving trustee. But, supposing it were vested in him, for whose benefit does he hold it? Against whom could he recover possession after all this lapse of years? The person in possession, so far as there is any possible possession, is the local authority. The land was conveyed for the purposes of the road. The local authority have had all such possession as is possible for a local authority. The fee, so far as it exists in any portion of the land other than that which has been in the occupation of the local authority, is held by a bare trustee; and so far as I can see the only conceivable cestui que trust is the local authority. How he can bring any action to recover possession against them I fail to see.

The only other suggestion was that it has passed to the county council under the Act of 1888. It seems to me that I should do wrong to attempt to follow the ingenious suggestions of counsel so as to be astute to render the Act a failure by coming to a conclusion which to my mind would be absurd.

There can be no vesting as a main road under s. 11, for the urban authority have retained the powers and duties of maintaining and repairing this road.

But it is said that s. 64 applies. [His Lordship read it.] It is contended that under these sections there is no vesting in the urban authority of the legal estate in so much of the land, which has been incorporated with the road, as is not used for the ordinary road purposes under s. 11, but that under s. 64 it is vested in the county council. I think that would be an extravagant conclusion to come to. The two sections, 11 and 64, seem to me to be intended to be read together; and the property which is excepted by the words in s. 11 is intended to be vested, under the sections of the Public Health Act which

have been quoted, in the urban authority. The Act of 1888, to my mind, really assists the plaintiffs rather than the defendants. I think that exhausts the suggestions that were made as regards every possible tenant into whom the legal estate in the fee simple of this land may have got.

But I desire to point out that the reasoning on which the former cases have gone, namely, that the Legislature must not be presumed to have taken away without compensation anything more than was absolutely required, is inapplicable to a case like the present: the land has been acquired and paid for for the very purpose of the road. That would not be sufficient in itself to enable me to give the construction I have given to the word "street." I arrive at that, as I have already pointed out, by saying that what the Courts have held street to mean is "so much as is required for the purposes of the street." That being so, I hold that in the present case the whole of the land was acquired and is still required for the purposes of the street.

The plaintiffs had no right, therefore, to take their wires across the portion of the atmosphere which lies above this piece of land belonging to the defendant council, and, therefore, their application for an injunction fails.

But under the circumstances of the case and the submission made so late as the rejoinder, I think justice will be done by my dismissing the action without costs.

Solicitors: *Benham & Meyer; A. M. M. Forbes.*

J. R. B.

BUCKLEY J.

1902

Feb. 25, 26.

In re DAVIS. HANNEN *v.* HILLYER.

[1899 D. 1018.]

Will—Legacy—Charity—Non-existence of Institution named—Lapse—Cy-près—Meaning of "Charitable Institution."

The testatrix by her will gave pecuniary legacies to charities established for a variety of purposes, e.g., to aid consumptive persons, blind persons, orphans, deaf and dumb persons, epileptics and paralytics. One of the legacies was of a sum of 500*l.* to "the Home for the Homeless, 27, Red Lion Square, London."

After providing that in the event of any question arising as to the designation of any of the charitable institutions, or of any doubt arising as to which one of two or more of them it was intended to benefit, the decision should rest absolutely with her executor, and after giving other legacies, the testatrix provided that her residuary moneys should be "divided rateably among the various charitable institutions which are beneficiaries under this instrument."

At the date of the will there was not, and there never had previously been, in London any charitable institution known as the "Home for the Homeless." After making provision for debts and legacies there was a fund distributable as residue among the charitable institutions which were beneficiaries under the will:—

Held, (1.) that the Court was justified in drawing the inference of a general charitable intention with reference to the gift of 500*l.*, and that the gift did not lapse, but must be administered cy-près; (2.) that the word "institutions" was large enough to include any authority or person that would have to administer the fund, and that that authority or person was also entitled to the share of residue which would have been taken by the "Home for the Homeless" if it had existed.

Sarah Davis, by her will dated March 30, 1894, after revoking former testamentary dispositions, gave to the Consumption Hospital, Brompton, 500*l.*; to the School for the Indigent Blind, Southwark, 1000*l.*; to the Royal Albert Orphan Asylum, Bagshot, 500*l.*; "to the Home for the Homeless, 27, Red Lion Square, London, the sum of five hundred pounds (500*l.*)"; to St. Mary Hospital, Cambridge Place, Paddington, 500*l.*; to the Female Orphan Asylum at Beddington, Surrey, 500*l.*; to the Deaf and Dumb Asylum, Old Kent Road, 500*l.*; to the London Fever Hospital, Islington, 200*l.*; to the Small Pox Hospital, Highgate Hill, Upper Holloway, the sum of

100*l.*; to the Hospital for Epilepsy and Paralysis, Portland Terrace, Regent's Park, 500*l.*

The will continued as follows: "And I declare that the receipt of the respective treasurers of the aforesaid institutions shall be a sufficient discharge to my executor for the said legacies respectively, and though, in the event of the assets of my estate proving insufficient to discharge the said legacies in full, they must all abate pro tanto, yet my will is that the said legacies shall not only be paid in full, but that they shall also be paid free from legacy duty, and, further, in the event of any question arising as to the designation of any of the charitable institutions hereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it is intended to benefit, the decision shall rest absolutely with my executor." And, after giving, free of legacy duty, certain pecuniary legacies to individuals and appointing an executor, the testatrix declared as follows: "If, after the payment of my funeral and testamentary expenses and debts, and after the payment in full, free of legacy duty, of all and singular the legacies hereinbefore mentioned, there be remaining any residue of funds derived from the sale and realization of my stocks, debentures, or other real and personal securities or any other residuary moneys whatsoever, the same shall be divided rateably among the various charitable institutions which are beneficiaries under this instrument."

The testatrix died in 1899, and her will was proved in the same year. Her estate was sufficient to leave a large sum available for rateable distribution among the charitable institutions under the residuary gift.

An originating summons was taken out, in which the executor was plaintiff, and the secretary of the British Asylum for Deaf and Dumb Females, the secretary to the School for the Indigent Blind, and the Attorney-General were defendants, for the determination of the questions—(1.) Whether the British Asylum for Deaf and Dumb Females was entitled to the legacy of 500*l.* and share of residue given to the Home for the Homeless, 27, Red Lion Square, London. (2.) In the event of the British Asylum not being so entitled, how (*a*) the

BUCKLEY J. 1902 DAVIS, *In re.* HANNEN *v.* HILLYER.

legacy of 500*l.* and (*b*) the same share of residue ought to be applied. On January 26, 1900, Byrne J. ordered the following inquiry to be made: "Whether there was on March 30, 1894 (the date of the testatrix's will), or previously, any and what charitable institution in London called or known as 'The Home for the Homeless,' or bearing any and what similar title, and what charitable institution (if any) was by the testatrix in her will intended to be referred to under the designation of 'The Home for the Homeless, 27, Red Lion Square, London.'"

J. B. Davis, one of the next of kin, was served with the order and made a defendant to the summons, and in December, 1901, the master certified that the result of the inquiry was that at the date of the will or previously there was "no charitable institution in London called or known as 'The Home for the Homeless,' or bearing a similar title," and that no evidence had been adduced to enable him to certify "what charitable institution was by the testatrix in her will intended to be referred to under the designation of 'The Home for the Homeless, 27, Red Lion Square, London.'"

The summons was heard before Buckley J. on February 25 and 26, 1902, when the following questions were argued—(1.) Whether there was a lapse of the legacy of 500*l.* to the Home for the Homeless, or such an indication of a general charitable intent as to justify a cy-près application of the legacy, and (2.) how the share of residue which was given to the Home for the Homeless was to be applied.

H. M. Humphry, for the executor.

H. Terrell, K.C., and *W. M. Cann*, for J. B. Davis, representing the next of kin. As there is not and never has been such a charitable institution as the Home for the Homeless, the gift to that supposed charity fails altogether, and the legacy is not applicable cy-près.

Where there is a legacy to a charitable institution which at some time existed but has ceased to do so at the date of the will, there is a lapse and the cy-près doctrine is inapplicable: *In re Ovey*. (1) On the other hand, where there is a gift to a

(1) (1885) 29 Ch. D. 560.

charitable institution which cannot be identified, the Court sometimes finds that there is a general charitable intent. Where no such institution could be found as the "society instituted for the increase and encouragement of good servants," it was held that the gift did not fail: *Loscombe* v. *Wintringham.* (1) Lord Langdale M.R. said that he could not "suppose that the testator had a special intention in favour of this particular society only."

Where the testatrix bequeathed "to the following societies or institutions established or carried on in London" several legacies, including one to "the Clergy Society," and no society of that description could be found, but there were other gifts to societies connected with the Church of England, Page Wood V.-C. inferred an intent to benefit the clergy of the Church of England, and applied the cy-près doctrine: *In re Clergy Society.* (2) James V.-C. applied the doctrine where there was a gift to the Church Pastoral Aid Society in Ireland, and with the assent of the Attorney-General ordered payment to the Spiritual Aid Society for Ireland: *In re Maguire.* (3) There the ground was general charitable intent.

On the other hand, where trusts were declared with reference to a private chapel on the settlor's estate, but were not acted on in the settlor's lifetime except to a limited extent, Chitty J. declined to impute to the settlor any charitable intent independently of the estate and declared the trusts void: *Hoare* v. *Hoare.* (4)

In *In re Rymer* (5) the gift was to a society which ceased to exist shortly before the death of the testator, and Chitty J. and the Court of Appeal held that the gift was for the benefit of the particular institution, and could not be applied cy-près but failed. The Courts in that case followed *Clark* v. *Taylor* (6), which also related to an institution which had existed but had failed.

[BUCKLEY J. referred to *In re Slevin.* (7)]

(1) (1850) 13 Beav. 87, 89.
(2) (1856) 2 K. & J. 615.
(3) (1870) L. R. 9 Eq. 632.
(4) (1886) 56 L. T. 147.
(5) [1895] 1 Ch. 19.
(6) (1853) 1 Drew. 642.
(7) [1891] 2 Ch. 236.

BUCKLEY J. 1902 DAVIS, *In re.* HANNEN *v.* HILLYER.

There is nothing in the cases cited inconsistent with the view that the legacy in this case lapses and that the 500*l.* goes to the next of kin.

J. M. Stone, for the School for the Indigent Blind. The 500*l.* which is the subject of the gift to the Home for the Homeless does not lapse but falls into residue, and is divisible rateably among the other charitable institutions mentioned in the will: *In re White's Trusts* (1) and *Moggridge* v. *Thackwell.* (2)

[*H. Terrell, K.C.*, referred to *Marsh* v. *Attorney-General.* (3)]

R. J. Parker, for the Attorney-General. Where the charity named in the will has been in existence but has ceased to exist at the date of the will there is a lapse; but where the society named has never existed the Court may draw the inference that the gift was made with a general charitable intent.

BUCKLEY J. This testatrix bequeathed to the "Home for the Homeless, 27, Red Lion Square, London," the sum of 500*l.* At the date of her will there was not, and there never had previously been in London, any charitable institution known as the "Home for the Homeless." The question I have to determine, therefore, is whether, having regard to the whole of this will, there is a lapse, or whether there is an indication of a general charitable intention so that effect can be given to the gift, although the legatee named was, and is, non-existent.

Now there is one class of decisions which deals with the case in which a legacy is given to a charitable institution which has existed but has ceased to exist. I think that in all or nearly all these cases the charitable institution named in the will existed at the date of the will, but ceased to exist before the testator's death. In that class of cases it has been held that there is a lapse.

The earliest authorities upon the point are a decision of Kindersley V.-C. in *Clark* v. *Taylor* (4), and another of Stuart V.-C. in *Russell* v. *Kellett.* (5) In *Fisk* v. *Attorney-*

(1) (1886) 33 Ch. D. 449.
(2) (1803) 7 Ves. 36; 6 R. R. 76.
(3) (1860) 2 J. & H. 61.
(4) 1 Drew. 642.
(5) (1855) 3 Sm. & Giff. 264.

General (1) Page Wood V.-C. said: "Then there is the other point which was argued by Mr. Wickens, as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration." That is to say, Page Wood V.-C. at that date doubted whether, in such a state of facts as that, the Court might not still be able to find a general charitable intention. However, that matter has since come before this Court in *In re Ovey* (2), and before the Court of Appeal in *In re Rymer* (3), and it must now be taken that that intimation of Page-Wood V.-C. in *Fisk* v. *Attorney-General* (1) cannot be relied on, and that the rule in *Clark* v. *Taylor* (4) is the right one. In *In re Rymer* (3) Lord Herschell, at page 34 of the report, says that the cases relied on by the appellant's counsel seem "to lead to the conclusion that this case does come within the class of cases, the first of which is *Clark* v. *Taylor* (4), decided forty years ago, but which has been followed often since, and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound." So that I start with this: that if there be a gift to a charitable institution which existed, but has ceased to exist, there is a lapse.

That is not the case with which I have to deal here. This gift is to a charitable institution which never existed at all. There are four decisions upon that class of case. I must examine them in detail, but the principle which seems to me to underlie them all is, that where you find a gift to a charitable institution which never existed, the Court, which always leans in favour of charity, is more ready to infer a general charitable intention than to infer the contrary. Of course, it is perfectly possible to contemplate that a testator may have intended to benefit a particular institution which he thought existed, but which did not exist. Nevertheless, when I look at the four cases which I have referred to, I find that the Court did not regard the intention to benefit a particular institution as the more probable state of things, but regarded

(1) (1867) L. R. 4 Eq. 521, 527.
(2) 29 Ch. D. 560.
(3) [1895] 1 Ch. 19, 34.
(4) 1 Drew. 642.

BUCKLEY J. 1902 DAVIS, *In re.* HANNEN *v.* HILLYER.

it as more probable that what the testator had in view was not the person but the purpose. There was no person such as he described, and the Court gave effect to the purpose which he indicated. Of those four cases I will take the first and the last together; they have less bearing on the point before me than the other two. The first is *Loscombe* v. *Wintringham*. (1) The gift there was "to the governors, guardians, and trustees of a society instituted for the increase and encouragement of good servants, to the intent and purpose that the sum of 500*l*. of lawful money of Great Britain might be paid to the governors, guardians, and trustees of the said society for the increase and encouragement of good servants." The first obvious comment is that no society is mentioned at all by its name. The particular sort of society is pointed to, and that is all. It was easy, as it seems to me, in that case to arrive at the conclusion that the object of the testator was to give to a purpose and not to a person, and to hold, as was held there, that there was a good charitable gift.

The last case in point of date is that of *Hoare* v. *Hoare*. (2) [His Lordship stated the facts of that case, and continued:—]

Chitty J. held that there was not a general charitable purpose, but that the settlor's purpose was only to devote a sum of money to the maintenance of what was not a public chapel, but his own private chapel on his own estate, and that, having regard to this definition of the purpose, that purpose had failed and the trusts were invalid. It seems to me that that case turned on its own particular facts, and does not assist me very much on general principles.

There remain two other cases, and from those, it seems to me, the principle is to be deduced. One is *In re Clergy Society*. (3) There legacies were given "to the following societies or institutions established or carried on in London" in this order: to the Church Building Society, so much; to the Clergy Society, so much; to the Society for Promoting Christian Knowledge, so much; to the Church Missionary Society, so much; and to the Clergy Orphan Society, so much.

(1) 13 Beav. 87. (2) 56 L. T. 147.
(3) 2 K. & J. 615, 622.

No society came forward and established that it was the society mentioned as "the Clergy Society." There was a society in the diocese of Gloucester to which the testatrix had been a contributor, but the Vice-Chancellor thought that was excluded because it was not established or carried on in London. As regards those societies which were established or carried on in London, none of them answered the description of "the Clergy Society." The Court, nevertheless, came to the conclusion that a good general charitable purpose had been declared, and looking at page 622 of the report it is evident that the Court proceeded upon this ground—that, having regard to the position in which the gift was placed in the will —that is to say, with the other gifts which I have referred to on either side of it—there was sufficient to shew a general charitable purpose. The Vice-Chancellor says: "Then it was suggested, that the bequest must be considered void for uncertainty, because no object can be found to answer the description. In the case before Knight Bruce L.J. there was a gift to a charity in Middlesex; and there being none which exactly answered the description, it was held, that the Court had authority to direct a scheme; and, in this case, this legacy being preceded by a legacy to the Church Building Society, and followed by legacies to the Church Missionary Society and to the Clergy Orphan Society, I think there is sufficient on the face of the will to shew that the testatrix meant to confer a charitable benefit on the clergy of the Church of England." That seems to me to have been the ratio decidendi in *In re Clergy Society*. (1) The remaining case, *In re Maguire* (2), is a decision of James V.-C., and is, in my opinion, a very strong case. The gift upon which the question arose was to the "Church Pastoral Aid Society in Ireland." There was no such society. The immediately preceding gift was to the "Church Pastoral Aid Society in England," and there was such a society. There might have been a strong inference there that as in the case of the former gift there was such a person as was referred to, the second gift indicated a person, and not a purpose. The Vice-Chancellor thought not. There was in

(1) 2 K. & J. 615, 622. (2) L. R. 9 Eq. 632, 634.

BUCKLEY J. 1902 DAVIS, *In re.* HANNEN *v.* HILLYER.

the will a preceding gift to a society which did exist, namely, the Additional Curates' Aid Society in Ireland. Those, I think, are all the material facts of that case. In his judgment the Vice-Chancellor said: "The intention of the testatrix to devote this sum to charity, and also the particular object of the charity, are sufficiently indicated by the name of the society itself, and by the place in which the legacy is found among other legacies to charity. There can be no doubt of the intention of the testatrix to provide for the objects embraced by the Spiritual Aid Society"—that was the same society as the Additional Curates' Aid Society, which had changed its name—"and it follows from *Loscombe* v. *Wintringham* (1) and *In re Clergy Society* (2) that this is a perfectly good charitable bequest." Then, after referring to what Page Wood V.-C. said in *Fisk* v. *Attorney-General* (3), James V.-C. said: "I certainly do not intend myself to go further than Wood V.-C. did, but in this case there is a clear intention by the testatrix to effect a particular object of charity—pastoral aid in Ireland—which is carried out by the society now claiming it. I apprehend the Attorney-General will not object, and there will be an order for payment of the legacy to the Spiritual Aid Society for Ireland to be applied for the purposes of Church pastoral aid in Ireland." As I said, the Spiritual Aid Society was a society to which, beyond question, a gift had already been made by the will.

It seems to me that the principle which is to be extracted from *In re Clergy Society* (2) and *In re Maguire* (4) is that the Court will in this class of cases—where there is a gift to a charity which has never existed at all—lean in favour of a general charitable purpose, and will accept even a small indication of the testator's intention as sufficient to shew that a purpose, and not a person, is intended.

Now, in the will in the present case I find, in the first place, that this gift is interpolated between other charitable gifts. To summarise the objects of the gifts, they are: first, the blind; secondly, orphans; then comes the one in question, the home for the homeless; then a hospital; then orphans again;

(1) 13 Beav. 87.
(2) 2 K. & J. 615.
(3) L. R. 4 Eq. 521.
(4) L. R. 9 Eq. 632.

then the deaf and dumb; then fever and small-pox hospitals, and the hospital for epilepsy and paralysis. So that you find this gift to a non-existent charity called "the Home for the Homeless" interpolated between gifts to the blind and to orphans, to the deaf and dumb, and to the sick. I find one ground there that was relied upon in both *In re Clergy Society* (1) and *In re Maguire*. (2) In a later part of her will the testatrix says: "In the event of any question arising as to the designation of any of the charitable institutions hereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it is intended to benefit, the decision shall rest absolutely with my executor." It seems to me that that is the plainest indication that the testatrix intended that her charitable purposes should not fail because she had made some mistake as to the person to whom she had directed the legacy to be paid. And there is this further indication of intention. When the testatrix comes to residue, she gives it so that it "shall be divided rateably among the various charitable institutions which are beneficiaries under this instrument." I think that there is more ground here than there was in either *In re Clergy Society* (1) or *In re Maguire* (2) for the Court drawing the inference of a general charitable intention, and I therefore hold that the legacy is effectual.

I desire to add that *Loscombe* v. *Wintringham* (3), *In re Clergy Society* (1), and *In re Maguire* (2) were all considered by Lord Herschell in *In re Rymer*. (4) Dealing there with a case of gift to a charity existing at the date of the will, but which had ceased to exist, Lord Herschell says: "The appellant contends that under those circumstances, and on the cy-près doctrine, the gift ought still to be treated as charitable, and to be applied to some cognate purpose. In support of this, when once the construction has been arrived at which I have put upon the will, I have been unable to find that they have cited a single authority in point. They placed reliance upon the decision of Lord Eldon in *Moggridge* v. *Thackwell* (5) and *Mills* v. *Farmer*." (6) From the latter case he reads this

(1) 2 K. & J. 615.
(2) L. R. 9 Eq. 632.
(3) 13 Beav. 87.
(4) [1895] 1 Ch. 19, 29.
(5) 7 Ves. 36; 6 R. R. 76.
(6) (1815) 1 Mer. 55; 13 R. R. 247.

BUCKLEY J. 1902 DAVIS, *In re.* HANNEN *v.* HILLYER.

language of Lord Eldon (1): "But, to give effect to a bequest in favour of charity, the Court will . . . . supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the Ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient." Lord Herschell then goes on to say that that is the principle in *Moggridge* v. *Thackwell* (2) and in *Mills* v. *Farmer* (3), and then, after mentioning *Loscombe* v. *Wintringham* (4), *In re Clergy Society* (5), and *In re Maguire* (6), he adds: "Those cases also form a class which has been established upon the same principles and considerations as I think guided the Court in *Moggridge* v. *Thackwell* (2) and *Mills* v. *Farmer* (3), and that class of case."

J. M. Stone. A further question arises, namely, Who is entitled to the share of residue which would have gone to the "Home for the Homeless" if there had been such an institution? The residue is to be divided rateably amongst the charitable "institutions" which are "benficiaries under this instrument." To come within the gift the object must be first an "institution" and secondly a beneficiary "under" the will. The Court having taken the view that the 500*l.* given to the non-existent home does not lapse to the next of kin, but must be applied to charitable purposes, the authority which will carry those purposes into effect cannot be said to be either a charitable or other institution, or to take "under" the will.

(1) 1 Mer. 94.
(2) 7 Ves. 36; 6 R. R. 76.
(3) 1 Mer. 55; 13 R. R. 247.
(4) 13 Beav. 87.
(5) 2 K. & J. 615.
(6) L. R. 9 Eq. 632.

The Court has inferred a general charitable intention, and "where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as parens patriæ, is the constitutional trustee": *Moggridge* v. *Thackwell.* (1) The King does not come within the term charitable institution. If, on the other hand, there is a charitable trust in favour of a specific object, which the Court will execute by means of a scheme, neither the Court nor any person or authority which has to effect the charitable purpose can be said to be a charitable institution. And neither the King, nor the Court nor any such person or authority can be said to "take under this instrument." And those who do take the 500*l.* take it under the cy-près doctrine—not under the will; and therefore the whole residue ought to be divided amongst the charitable institutions, other than the "Home for the Homeless" named in the will.

R. J. Parker. Moggridge v. *Thackwell* (2) shews that "where there is a general indefinite purpose, not fixing itself upon any object . . . . the disposition is in the King by Sign Manuel, but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust." And Lord Eldon says: "I have the less difficulty, from the doctrine hinted at in the *Attorney-General* v. *Matthews* (3), as the doctrine of the constitution of the country, and this is also the language of Wilmot L.C.J., that, whether this Court, or the King by Sign Manuel, executes it, the constitution finds a trustee in the Court, or the King, to act in the one case as the Court would act; and, considering the King, parens patriæ, as one, who would act, exercising a discretion with reference to the intention. Therefore there would not be, as there ought not, any difference in the execution; and I am delivered from the anxiety I should feel from the consideration, that I should be taking away from the natural expectations of those, whose disappointment I regret as much as any one; for those, whose duty it would be to advise the Crown, would think themselves equally bound to attend to the particular object." He means that it is only a question of procedure, and that whether the charitable purpose is effected by the King or some one else,

(1) 7 Ves. 36, 83; 6 R. R. 76. (2) 7 Ves. 87. (3) (1676) 2 Lev. 167.

BUCKLEY J. 1902 DAVIS, *In re.* HANNEN *v.* HILLYER.

there is the administration of a trust and not a mere act of grace. If there is a good charitable trust the word "institution" cannot be confined to the charity named in the will.

BUCKLEY J. The further question raised is this: The residue is given "to be divided rateably among the various charitable institutions which are beneficiaries under this instrument." It is argued that the authority which may have to effect the general charitable purpose as regards this legacy will not be within the words "charitable institutions which are beneficiaries under this instrument." Now, if it be a question whether the purpose here described is a general indefinite purpose, in which case it would be for the King by sign manual to deal with the fund, or whether there is an object pointed out in which case the fund would be administered by the Court, I do not know that I need decide that question, having regard to what was said in *Moggridge* v. *Thackwell*. (1) As at present advised, it seems to me that there is not a general indefinite purpose, but a specific object—that is, that the homeless are to be benefited. But whether it be the one or the other, it seems to me it would be a most narrow construction to hold that the authority, whoever it is, that will have to give effect to the general charitable purpose, is not within the words "charitable institutions which are beneficiaries under this instrument." However this fund is administered, it must be administered by somebody or other in favour of a class of persons—that is, the homeless. The word "institutions" is large enough to cover the authority or person that administers that fund. The residue, I think, goes rateably among the various charitable institutions who are benefited under this instrument, including in that the institution or authority that has to administer this legacy of 500*l*.

Solicitor for executor: *W. Jessop.*

Solicitor for next of kin: *Tippetts.*

Solicitors for the School for the Indigent Blind: *Smith, Fawdon & Low.*

Solicitor for Attorney-General: *The Treasury Solicitor.*

(1) 7 Ves. 36; 6 R. R. 76. F. E.

BUCKLEY J.
1902
Feb. 26, 27.

In re BEAUMONT. BEAUMONT *v.* EWBANK.

[1901 B. 4975.]

Donatio Mortis Causâ—Gift of Cheque drawn by Deceased—Non-payment in his Lifetime—Overdrawn Account.

On February 19, 1901, B., who was very ill and in expectation of death, drew a cheque for 300*l.* in favour of E., to whom it was at once handed. E. indorsed the cheque, and on February 23 it was presented for payment at B.'s bank, where his account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B., and that he required some confirmation of the signature. The Court found that the manager was minded to "lend" the money to pay the cheque if he found that the signature was genuine. B. died on February 25, 1901, without the cheque having been cashed:—

Held, following *Hewitt* v. *Kaye*, (1868) L. R. 6 Eq. 198, and *In re Beak's Estate*, (1872) L. R. 13 Eq. 489, that there was not a valid donatio mortis causâ.

Observations on *Bromley* v. *Brunton*, (1868) L. R. 6 Eq. 275, and *In re Dillon*, (1890) 44 Ch. D. 76, and as regards what amounts to constructive payment of a cheque.

On February 19, 1901, one Beaumont was very ill and in expectation of death. His niece was called to his room. When she got there, he told her that he must draw a cheque in favour of Mrs. Ewbank at once. She got his cheque-book, and by his directions filled up a cheque in Mrs. Ewbank's favour for 300*l.*, and he signed it. She then, by his direction, handed the cheque to Mrs. Ewbank, who was in the same house. The Court found that Beaumont intended the proceeds of the cheque to be Mrs. Ewbank's in case of his death. She indorsed the cheque and handed it to her bankers, who presented it for payment at Beaumont's bank on February 23. Beaumont's account was overdrawn, and the bank manager refused to cash the cheque, and pointed out that the signature was not like Beaumont's ordinary signature, and required some confirmation of the assertion that it was his signature. On February 25, before that confirmation was obtained, Beaumont died. The cheque was never cashed. The question was raised

BUCKLEY J. 1902 BEAUMONT. *In re.* BEAUMONT *v.* EWBANK.

by originating summons whether there was a valid donatio mortis causâ.

Tindal Robertson, for the executors—who had taken out the originating summons—stated the facts and the question to be decided.

Sargant, for Mrs. Ewbank. There is a valid donatio mortis causâ. There was a handing to the donee, while the donor was expecting to die, and with the intention that she should take if he died, of an order on the bank to pay the money. The title was as complete as it could be without actual payment, and the case is within the principle of *Duffield* v. *Elwes*. (1) That was the case of handing over deeds of mortgage and a bond. There is enough here without any expression of intention to warrant the inference that the gift was to take effect if the donor died: *Gardner* v. *Parker*. (2)

As to the kinds of documents which are good subject-matter of a donatio mortis causâ, there may be instanced promissory notes payable to order, though unindorsed: *Veal* v. *Veal* (3); bills of exchange payable to order: *Rankin* v. *Weguelin* (4); *In re Mead*. (5)

As regards cheques, there has been some conflict. The delivery of the donor's own cheque, which was not presented before his death, was held not to be a good donatio mortis causâ: *Hewitt* v. *Kaye*. (6) In the present case, however, the cheque was presented in the donor's lifetime, and where the donor's own cheque was presented in his lifetime, but not paid because there was a doubt as to the signature, it was held that there was a complete gift inter vivos: *Bromley* v. *Brunton*. (7) In that case Stuart V.-C. treated the giving of the cheque as an appropriation of so much of the donor's money at the bank. In the present case the account was overdrawn; but that was not the reason why the cheque was not paid. Here, again, the reason was that there was a doubt as to the signature.

(1) (1827) 1 Bli. (N.S.) 497; 30 R. R. 69.
(2) (1818) 3 Madd. 184; 18 R. R. 213.
(3) (1859) 27 Beav. 303.
(4) (1832) 27 Beav. 309.
(5) (1880) 15 Ch. D. 651.
(6) L. R. 6 Eq. 198.
(7) L. R. 6 Eq. 275.

In re Beak's Estate (1) is distinguishable, because there, as in *Hewitt* v. *Kaye* (2), the cheque was not presented in the donor's lifetime.

Where other persons' cheques, payable to the deceased but not indorsed by him, were handed by him in his last illness to his son, it was held by Chitty J. that there was a good gift: *Clement* v. *Cheesman.* (3) And a banker's deposit note was held to be good subject-matter of a donatio mortis causâ in *In re Dillon.* (4) It was contended there in the Court of Appeal that the document was only the donor's own cheque payable to bearer because on the back of the note there was a form of cheque, and the note contained the direction, "when the money is withdrawn . . . . the depositor must sign the cheque on the back." The Court held that the intention was to give the note and not merely the cheque; but in his judgment Lindley L.J. said that whether a gift by a man of his own cheque was a good donatio mortis causâ might some day "require consideration." *Hewitt* v. *Kaye* (2) and *In re Beak's Estate* (1) had both been cited, and therefore Lindley L.J. seems to have considered that, notwithstanding those cases, the point was still open.

As regards the fact of there being no funds to meet the cheque, it is submitted that that is immaterial—at any rate, if the only reason for refusing payment was that the bank manager considered the drawer's signature doubtful. [He also referred to 1 White and Tudor's Leading Cases, 7th ed. pp. 410, 411.]

Jessel, for the residuary legatees under the will of the deceased. If the gift operated at all, it was as a gift inter vivos. Apart from the fact that what was handed over was the donor's own cheque, there was no donatio mortis causâ, because the deceased had no intention that the money should be paid back to him if he recovered from his illness. "If . . . . it appears from the circumstances of the transaction that the donor intended to make an immediate or irrevocable gift, it will not be a good donatio mortis causâ": 1 White and Tudor's

(1) L. R. 13 Eq. 489.
(2) L. R. 6 Eq. 198.
(3) (1884) 27 Ch. D. 631.
(4) 44 Ch. D. 76.

BUCKLEY J. 1902 BEAUMONT, *In re.* BEAUMONT *v.* EWBANK.

Leading Cases, 7th ed. p. 404, citing *Edwards* v. *Jones* (1); *Cain* v. *Moon*. (2)

If in *Bromley* v. *Brunton* (3) Stuart V.-C. meant to lay down that a cheque is an equitable assignment of a portion of the drawer's bank balance, the decision is directly opposed to that of Jessel M.R. in *Hopkinson* v. *Forster*. (4) Moreover, *Bromley* v. *Brunton* (3) is distinguishable on the ground that there were assets of the bank in that case, whereas there was here nothing to meet the cheque. A cheque is only "a bill of exchange drawn on a banker payable on demand," and "a bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof": Bills of Exchange Act, 1882, ss. 73, 53. The duty and authority of a banker to pay a cheque are determined by notice of the customer's death: Ibid. s. 75. This case differs from all those which have been cited for the donee, inasmuch as there was here no money at the bank to meet the cheque, and there was no duty on the bank to pay it. [He also referred to Williams on Executors, 9th ed. p. 689, n.]

Sargant, in reply, was stopped on the point whether the deceased intended that the gift should take effect on his death.

Cur. adv. vult.

Feb. 27. BUCKLEY J. The question to be decided is whether the testator made a valid donatio mortis causâ of 300*l*. Subject to a fuller statement of the facts to be made later, it is sufficient to say that what he did was to sign and hand over his own cheque, and that it was not paid before his death.

A donatio mortis causâ is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must

(1) (1836) 1 My. & Cr. 226; 43 R. R. 178.
(2) [1896] 2 Q. B. 283, 286.
(3) L. R. 6 Eq. 275.
(4) (1874) L. R. 19 Eq. 74.

be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so. In *Gardner* v. *Parker* (1) Sir John Leach V.-C. says: "It is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death." It is a question of fact: the inference may be drawn that the gift was intended to be absolute, but only in case of death. Sir John Leach V.-C. in *Duffield* v. *Elwes* (2) held that a mortgage or a bond given as a collateral security for money due on mortgage could not be made the subject of a donatio mortis causâ. That decision was reversed by Lord Eldon. (3) He pointed out that in the case of what was said to be a donatio mortis causâ the question for decision was not similar to that which arises when there is an incomplete voluntary conveyance; for this reason, that in the former case the title is not to be complete until the donor is actually dead. The question is not whether there is a complete title, but whether the donee can call upon the legal personal representative of the donor to make good his title. The legal personal representative is after the donor's death a trustee for the donee. Lord Eldon says (4): "The opinion which I have formed is, that this is a good donatio mortis causâ, raising by operation of law a trust."

Accordingly, on the principle laid down by Lord Eldon in *Duffield* v. *Elwes* (3), the following have been held good subjects of donation: (*a*) A promissory note payable to the deceased's order but not indorsed: *Veal* v. *Veal.* (5) (*b*) Bills of exchange in favour of the deceased or his order: *Rankin* v. *Weguelin.* (6) (*c*) Bills of exchange payable to order and which had not been indorsed: *In re Mead.* (7) (*d*) A cheque payable to the donor's order and not indorsed: *Clement* v. *Cheesman.* (8) (*e*) A

(1) 3 Madd. 184; 18 R. R. 213.
(2) (1823) 1 S. & S. 239.
(3) 1 Bli. (N.S.) 497; 30 R. R. 69.
(4) Ibid. 543.
(5) 27 Beav. 303.
(6) 27 Beav. 309. From the report in 29 L. J. (Ch.) 323, n., it appears that the bills were not indorsed.
(7) 15 Ch. D. 651.
(8) 27 Ch. D. 631.

BUCKLEY J. 1902 BEAUMONT. *In re.* BEAUMONT v. EWBANK.

banker's deposit note: *In re Dillon.* (1) In none of these cases had the donee got the complete title, but he had obtained the indicia of title before the donor's death, and as against the legal personal representative he could say, "Lend me your name, or give me your indorsement, in order that I may complete my title. There is a trust in my favour." But how does the case stand where the deceased's own cheque is handed over? A man's cheque in favour of another person is not an equitable assignment of any part of the donor's balance at his bankers': *Hopkinson* v. *Forster.* (2) The cheque is only a revocable mandate, which may be stopped in the donor's lifetime and is revoked by his death. If, before the donor's death, the cheque is presented and paid, there is no question of donatio mortis causâ of the cheque, although there may be a question whether the money has been received on the terms that it shall only be retained in case of the donor's death. If the cheque is not presented in the donor's lifetime the gift is ineffectual; the cheque is a revocable order which is revoked by the donor's death: *Hewitt* v. *Kaye* (3); *In re Beak's Estate.* (4) In the last case I have referred to there was the additional fact that the delivery of the cheque was accompanied by delivery of the bankers' pass-book. The pass-book may be said to be the bankers' acknowledgment of a debt due to his customer, but Bacon V.-C. held that the delivery of the pass-book was no further evidence to establish the donatio mortis causâ than the cheque was. It is true that in *In re Dillon* (5) Lindley L.J. said: "It is said that here there was no good donatio mortis causâ, because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case." But, if *Hewitt* v. *Kaye* (3) and *In re Beak's Estate* (4) are to be reconsidered, it must be by some higher Court than this.

In all the cases, in order that the gift may be valid, it must I think be shewn that the donor handed over either property,

(1) 44 Ch. D. 76.
(2) L. R. 19 Eq. 74.
(3) L. R. 6 Eq. 198.
(4) L. R. 13 Eq. 489.
(5) 44 Ch. D. 83.

or the indicia of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift—for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which if acted on will procure the delivery of property.

Bromley v. *Brunton* (1) at first puzzled me. There the deceased gave her cheque to Bromley, who at once presented it. The assets of the customer were sufficient to pay it, but the signature was shaky, and the banker refused to pay until the signature was confirmed. The drawer died, and the cheque was not paid. Stuart V.-C. held that there was a complete gift inter vivos of the amount of the cheque. He must have so decided either because the cheque was constructively paid, the bankers having substantially said that they would pay, so that the payment constructively related back to the date of presentation; or because the bankers had in effect said, "The account is in credit, and we will hold enough of the balance to satisfy the cheque subject to the signature being shewn to be genuine," and therefore that there was a good equitable assignment. The Vice-Chancellor says: "The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers." I cannot suppose that he meant that the cheque by itself operated as an equitable assignment of money at the bank. Probably he meant that the effect of the cheque coupled with the bankers' action on it was to appropriate enough of the money at the bank to meet the cheque—that the bankers, so to speak, constructively honoured the cheque. *Bromley* v. *Brunton* (1), when carefully examined, does not appear to me to be in conflict with *Hewitt* v. *Kaye* (2) and *In re Beak's Estate.* (3) All the

(1) L. R. 6 Eq. 275, 277. (2) L. R. 6 Eq. 198. (3) L. R. 13 Eq. 489.

BUCKLEY J. 1902 BEAUMONT, *In re.* BEAUMONT *v.* EWBANK.

authorities seem to be consistent with the view that where the cheque is not actually or constructively paid there is no valid donatio mortis causâ.

What are the facts of the present case? On February 19 the deceased was very ill and in expectation of death. His niece Amy was called to his room. She went, and he told her that he must at once draw a cheque in favour of Mrs. Ewbank. The niece got the cheque-book and filled up a cheque in Mrs. Ewbank's favour for 300*l.*, and the deceased signed it. He did not himself hand the cheque to Mrs. Ewbank, although she was in the house, but he told Amy to give it to her, which she did. What was done was just as effectual as if he had himself given the cheque to Mrs. Ewbank. I infer that the gift was to take effect if he died. The donee, having received the cheque, presented it on February 23 at the deceased's bankers for payment. His account with them was overdrawn. The bank manager did not pay the cheque, and there is some conflict of evidence as to whether he declined to pay because he doubted whether the signature was genuine or because the account was overdrawn. The deceased died on February 25, and the cheque was never paid. I find as a fact that the mind of the manager was that he would lend the money—I purposely use the verb "lend"—to pay the cheque if he found that the signature was right.

What is the legal result? The case is not within *Bromley* v. *Brunton* (1); there could not be an equitable assignment of funds at the bank, for the deceased had no funds there. If the manager was minded to lend, there was no contract binding him to do so. There was no consideration for any contract, and if the cheque had come back with the signature confirmed, and the manager had in the meantime changed his mind, he need not have paid. No right had been acquired by the drawee, but an expectation only. Even if the manager did not change his mind, still an agreement to lend is not enforceable, and no right of property had passed to the drawee.

I hold, therefore, that in this case there was no valid donatio mortis causâ. The mere drawing of the cheque and

(1) L. R. 6 Eq. 275.

handing it to the donee, coupled with the subsequent facts, did not amount to such a traditio as was required in order to give the donee a right to the amount of the cheque on the death of the donor. Even if the account had been in credit the drawee would not, I think, have obtained any right to the property. If a cheque were given by a donor who was dangerously ill, and the drawee went to a branch of the bank in the country and asked for payment, and the manager said, "The cash is locked up for the night; come to-morrow, and I will pay you," and the drawer died in the night, it might very well be that then there was an appropriation by the undertaking to answer the cheque and a good donatio mortis causâ. But the facts of the present case do not come up to that supposed state of facts. There was no promise to pay in the case before me; and if there is a promise not to pay but only to lend, that is not sufficient.

I hold, therefore, that there is no valid donatio mortis causâ.

Solicitors for the executors and the residuary legatees under the deceased's will: *Lowndes & Son, for A. F. Griffith, Davie & Smith, Brighton.*

Solicitors for Mrs. Ewbank: *St. Barbe Sladen & Wing.*

F. E.

BUCKLEY J.

1902

Feb. 27.

MORGAN'S BREWERY COMPANY *v.* CROSSKILL.

[1902 M. 182.]

Practice—Originating Summons—Construction of "Written Instrument"—Articles of Association—Questions affecting Class of Shareholders—Rules of Supreme Court, 1883, *Order* XVI., *r.* 32 (*b*); *Order* LIV. *A*, *rr.* 1, 2.

A company proposing to issue new preference shares ranking pari passu with its existing preference shares served on one of its preference shareholders (sued on behalf of himself and the other preference shareholders) an originating summons for the determination of certain questions, with reference to the proposed issue, arising on the construction of the articles of association.

Buckley J. refused to appoint the defendant to represent the class, and said that he would not decide the questions so as to bind the class of preference shareholders unless a meeting of them was first called and nominated a person to represent them, in which case he would appoint him to represent the class. He, however, decided the question as between the company and the defendant.

MORGAN'S BREWERY COMPANY, LIMITED, was registered under the Companies Acts, 1862 to 1890, in 1894. Its memorandum of association empowered the company to acquire and undertake the whole or any part of the business, property, and liabilities of any person or company carrying on any business which the company was authorized to carry on. The capital of the company was 250,000*l.* in 25,000 shares of 10*l.* each, of which 15,000 were preference shares, and the memorandum provided that the capital might be increased, and that future capital might be divided into different series and have preferential rights.

Clause 12 of the articles of association empowered the company, "on the purchase or acquisition of any new or additional property . . . . to increase the issue of preference shares ranking pari passu with the original preference shares by an amount equal to one-third of the price given or agreed to be given for such new or additional property"; and clause 87 (xi.) empowered the directors to borrow on debentures, &c., up to a certain limit, and provided that "in case the company shall purchase or acquire any new or additional property . . . . the

above limit to the borrowing power shall be extended so that the directors " with the consent of a general meeting " shall be entitled to issue . . . . debentures . . . . to an amount equal to two-thirds of the price given or agreed to be given for such new or additional property."

The company purchased and paid for lands, built and unbuilt on, and also other businesses and the shares in other businesses; it also expended money in building on the unbuilt lands. It was proposed to recoup the expenditure by issuing preference shares ranking pari passu with the existing preference shares, and also debentures, the new shares being to cover one-third and the debentures to cover two-thirds of the expenditure.

The company issued an originating summons under Order LIV. A, r. 1, to which C. R. Crosskill was made the sole defendant as " a holder of preference shares issued by the plaintiff company, sued on behalf of himself and all other the holders of similar preference shares," for the determination of, amongst other questions, the question whether, in ascertaining the amount by which the issue of preference shares ranking pari passu with the original preference shares issued by the company might be increased under art. 12, on the purchase or acquisition of any new or additional property, the company was entitled to take into account all or any part of the moneys expended upon the construction and completion of new buildings upon vacant land (1.) where the vacant land was acquired specifically for the purpose of construction of such new buildings (2.) where it was already the property of the company.

H. Terrell, K.C., and *Whinney*, for the company. Order LIV. A, r. 1, of the Rules of the Supreme Court provides that " in any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." The articles of association are a " written instrument " within the rule, and under rule 2 of the same order the judge may " direct such

BUCKLEY J.
1902
MORGAN'S BREWERY COMPANY v. CROSSKILL.

persons to be served with the summons as . . . . he may think fit." The defendant is a preference shareholder, and has been served as representing the class of shareholders affected by the proposed issue of further preference shares.

[BUCKLEY J. Has the defendant any authority to appear for the other members of the class?]

Buckmaster, for the defendant. No. But under Order XVI., r. 32 (*b*), the judge may appoint one or more persons to represent the class.

BUCKLEY J. I am not prepared to decide the questions raised in the absence of the other members of the class, so as to bind them, unless the class has been consulted. If I am asked to bind all the preference shareholders, a meeting of them must first be called, and they can nominate some one to appear and act for them, and I will then appoint the person nominated to represent them on the hearing of the summons, which can be adjourned until after the meeting has been held. If that course is not taken, I can only decide the questions as between the company and the present defendant.

[The parties agreed to take the Court's decision as between them only, and the questions raised were thereupon argued and decided.]

Solicitors for both parties: *Eardley Holt & Hulbert.*

F. E.

BUCKLEY J.
1902
March 11.

FLETCHER *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

[1901 F. 1282.]

Railway Company—Mines—Compulsory Purchase under Special Act—Mine-owner stopped from working Mines within Prescribed Distance—Interest on Compensation Moneys.

The defendant company was the owner of a canal, and the plaintiffs were the owners of mines under the canal and the adjacent land. Under the provisions of a private Act passed in 1892, when the workings of a mine-owner in the position of the plaintiffs approached within a prescribed distance of the canal he was to give a two months' notice to the company of his intention to proceed with the work, and within the two months was not to continue working within the prescribed distance. If the company considered that the further working was likely to damage the canal and was willing to purchase and make compensation for the seam, it could give a counter-notice to that effect, and then the seam was not to be wrought or gotten, but was to be purchased and paid for by the company, the amount, if not agreed upon, being settled by arbitration.

The mine-owner's notice having been given, the company's counter-notice was given on November 19, 1892. An arbitrator was appointed in November, 1897, and it was subsequently agreed that all questions between the parties should be left to the arbitrator and that his decision should be accepted without dispute, except that on the question of interest on the amount found due for purchase-money and compensation either party might obtain the decision of a Court of law.

The arbitrator awarded 16,565*l.* for purchase-money and compensation, on the footing of the plaintiffs' seam having been purchased on November 19, 1892, and that interest at 4 per cent. on the amount should be calculated from that date until the date of payment:—

Held, that when the company gave its notice to the mine-owners, the latter were by force of the statute prevented from enjoying the minerals in their way—namely, by working them—and the company thenceforth obtained the enjoyment in its way—namely, by way of support—and became liable to pay the purchase-money; that from that time the mine-owners had been deprived of their property, and the company had enjoyed both that and the purchase-money, and that on the principle laid down in *Birch* v. *Joy*, (1852) 3 H. L. C. 565, with reference to ordinary vendors and purchasers, the mine-owners were entitled to the interest as awarded.

Caledonian Ry. Co. v. *Carmichael*, (1870) L. R. 2 H. L., Sc. 56, distinguished.

At the date of the commencement of the Act mentioned below, Herbert Fletcher held on lease and was working mines

BUCKLEY J.
1902
FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY.

and minerals in the lands beneath and adjoining the Manchester, Bolton and Bury Canal, which belonged to the Lancashire and Yorkshire Railway Company.

By the Lancashire and Yorkshire Railway (Various Powers) Act, 1892 (55 & 56 Vict. c. clxxvi.), which came into operation on June 27, 1892, it was provided (s. 53) that when the workings of any mine-owner in any seam of minerals should have approached to the prescribed distance from the canal he should give to the company at least two months' notice in writing of his intention to proceed with the working of the seam within the prescribed distance, and that "within such period of two months such mine-owner shall not work or continue to work the seam within the prescribed distance."

By s. 55, upon or at any time after the receipt of the mine-owner's notice the company might inspect the mine or workings, and it provided that if it appeared to the company that the working of the minerals within the prescribed distance or any part thereof was likely to damage the canal, and "if the company be willing to purchase and make compensation for such bed, vein, or seam within the prescribed distance or any part thereof to the mine-owner and shall give notice in writing to that effect to such mine-owner, then the said bed, vein, or seam within the prescribed distance, or such part thereof as the company may desire to be left, shall not be wrought or gotten but shall be purchased and paid for by the company, and if the company and the mine-owner do not agree as to the amount of such purchase-money and compensation, the same shall be settled by arbitration in the manner provided for by the Arbitration Act, 1889." The section concluded as follows: "Such compensation shall include, in addition to the value of the bed, seam or vein so purchased, all such additional expenses and losses as shall be incurred by the mine-owner by reason of the leaving of minerals for the support, security, or preservation of the canal, or for the protection of the colliery or collieries of such mine-owner, or of the continuous working of the said mines being interrupted as aforesaid, or by reason of the severance of such mines, or by reason of the same being worked in such manner and under such restrictions as not to

prejudice or injure the canal or the minerals not required to be left as aforesaid, and for any minerals not purchased by the company which cannot be obtained by reason of the exercise by the company of the option to purchase."

Sect. 62 was as follows: "Subject to the provisions aforesaid the mines and minerals in respect of which the company shall have purchased and made compensation as aforesaid shall vest in and belong to the company, but the same shall remain for ever unworked for the support of the canal and works."

At the time when the Act came into force, Fletcher was working his mines within the prescribed distance, and in July, 1892, he gave the company a notice in accordance with s. 53 of the Act, and on November 19, 1892, the company gave him notice, in accordance with s. 55, that the working of a portion of his mines therein specified lying under or adjacent to the canal was likely to damage the canal, and that they were willing to purchase and make compensation to him for the portion specified.

Fletcher died intestate in 1896, and, his administrators and the company being unable to agree as to the amount of the purchase-money and compensation payable, in November, 1897, an arbitrator was appointed to settle the amount.

It was subsequently agreed that all questions between the parties should be left to the arbitrator, and that his decision should be accepted without dispute, subject to this—that on the question of interest on the amount found to be due for purchase-money and compensation he should in making his award shew on the face of it whether it had been charged, and if so the rate per cent. and the period over which it was calculated, so that either party might, if thought fit, obtain the decision of a Court of law on the question. By his award dated April 30, 1901, the arbitrator awarded and determined that the sum of 16,565*l.* was the amount of purchase-money and compensation to be paid by the company in respect of the interest of all the lessors and lessees in the coal taken by the company on the footing of its having been purchased on November 19, 1892, and that simple interest on that sum should be calculated at

BUCKLEY J.

1902

FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY.

the rate of 4*l.* per cent. per annum from November 19, 1892, until the actual date of payment.

The company paid Fletcher's administrators the 16,565*l.* on December 20, 1901, but refused to pay the interest, and the administrators brought an action against the company claiming a declaration that they were entitled to have paid to them by the company interest on the 16,565*l.* from November 19, 1892, to December 20, 1901, and payment of the interest.

The action was tried before Buckley J. on March 11, 1902. Counsel for the company then contended that they were entitled to adduce evidence to shew that the plaintiffs were responsible for the delay which had occurred in arriving at the amount of the purchase-money and compensation; but the Court held that the only point open for discussion was the question of law whether the plaintiffs were entitled to interest on the 16,565*l.*, and from what date the interest ran.

Astbury, K.C., and *O. L. Clare*, for the plaintiffs. The notice by the company to the mine-owner stopped the latter from further working his mine. Thereupon the company became the equitable owner of the minerals referred to in the notice, and liable to pay the purchase-money and compensation referred to in the Act. The mine-owner and his representatives, the plaintiffs, have been kept out of the enjoyment of the mining property for years, and the payment of the purchase-money was greatly delayed. It was open to the arbitrator to give interest on the purchase-money, and the Court cannot reconsider his finding. The question of interest was left to him by the parties, and he could and did fix the time from which it was to run. He could also and did decide as to the cause of the delay, and held that the plaintiffs were not responsible for it. The defendants propose to raise some questions of fact; but they are precluded from doing so, and the only question is one of law, as to the interest payable by the company.

The ordinary rule, where the purchase-money is fixed by arbitration and the company takes possession before the price is ascertained, is that the vendor is, in the absence of agree-

ment, entitled to interest at 4 per cent. upon the purchase-money from the time when possession is taken: Browne and Theobald on Railways, 3rd ed. p. 138; *Rhys* v. *Dare Valley Ry. Co.* (1) In that case Bacon V.-C. pointed out the reason of the rule, namely, that from the time when the company's statutory rights are exercised by taking possession the company is owner of the land, and the former owner is owner of the price. The statutory right was exercised in the present case by the company giving its counter-notice. That stopped the mine-owner from further working—that is to say, deprived him of possession, and gave the company the right to the support of the minerals, which was the only sort of possession it ever could get, as s. 62 says that the mines "shall remain for ever unworked." *In re Pigott and Great Western Ry. Co.* (2) shews that in cases of compulsory purchase the company is in the position of an ordinary purchaser as regards the liability to pay interest. After notice to treat has been given and the price has been fixed there is a contract which can be enforced by specific performance, and if the vendor can "maintain an action for specific performance against a railway company under the ordinary rules as to specific performance, he is entitled, independently of bringing an action to enforce it, to the benefit of those rules which govern specific performance, including the rule as to payment of interest on unpaid purchase-money." And in the same case Jessel M.R. disapproved of *In re Eccleshill Local Board.* (3) In *In re Pigott and Great Western Ry. Co.* (2) it was held that where the title had not been accepted before the award, interest ran, not from the date of the award, but from the time when the company might have prudently taken possession, namely, when a good title was shewn. Here possession was taken, so far as it ever could be, by the giving of the company's notice, and from that time the interest began to run according to the rules as between an ordinary vendor and purchaser. *Rhys* v. *Dare Valley Ry. Co.* (1) was approved by Chitty J. in *In re Shaw and Birmingham*

(1) (1874) L. R. 19 Eq. 93. (2) (1881) 18 Ch. D. 146, 151, 153.
(3) (1879) 13 Ch. D. 365.

BUCKLEY J.
1902
FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY.

Corporation (1), and in no case is interest not payable by the purchaser unless the reason is palpable.

Littler, K.C., and *A. M. L. Langdon* (*H. Terrell*, K.C., with them), for the company. The arbitrator has only found the rate of interest payable and the date from which it ought to run. Sect. 55 of the Act of 1892 is framed in very much the same words as those of the Lands Clauses Act, 1845. The company is to pay the "purchase-money" and "compensation," which might very well include interest. The notice did not deprive the mine-owner of the occupation of the minerals. All that he had to do was to go on getting his coal from another point. The compensation is payable to him for not working the colliery in the way in which he was theretofore working it. Sect. 62 shews that the minerals only vest in the company from the time when the purchase-money has been paid. In *Caledonian Ry. Co.* v. *Carmichael* (2) it was held that the compensation was only payable from the time when the stone taken by the company became available for working by the mine-owner through its surface being then exposed.

[BUCKLEY J. There the purchase-money was payable at a postponed date; here it is payable as from a past date.]

This is not one of the few cases in which interest is payable, as laid down in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (3)

[BUCKLEY J. That was not a decision with reference to the equitable rule as to interest.]

The company did not, by giving notice, put the mine-owner out of possession, or give the company possession; the minerals only vest in the company on its paying compensation.

BUCKLEY J. In my judgment, the only point open for my decision is the question of law, whether the plaintiffs are entitled to the interest as calculated by the arbitrator, and it is left open as it would be if a special case had been stated under s. 19 of the Arbitration Act, 1889, raising that ques-

(1) (1884) 27 Ch. D. 614, 619. (2) L. R. 2 H. L., Sc. 56.
(3) [1893] A. C. 429.

tion of law. [His Lordship then decided that the parties had agreed that all the questions of fact were to be left entirely to the arbitrator, but that the question of law, whether interest was payable or not, was to be kept open, and that upon that either party might obtain the decision of a Court of law; and he also decided that the arbitrator had accepted the obligation of determining as a question of fact whether there had been delay on the part of the plaintiffs, and had found that no delay was attributable to them. His Lordship then proceeded as follows:—]

I go on, therefore, to consider the question of law, whether interest is or is not payable. The purchase by the company was under the Act of 1892; it was the interest of the company that the canal should not be let down. Sect. 53 of the Act requires the mine-owner, when he is getting within a certain prescribed distance of the canal, to give a notice to the company, and within the period of two months from that notice the mine-owner is not to work or continue to work, as the case may be, any bed, vein, or seam within the prescribed distance or such lesser distance as the company may fix. Therefore, as from the date when the mine-owner gives his notice, he is precluded from enjoying his property in the only way in which a coal seam can be enjoyed, namely, by working it—he cannot do anything further with it. The suspension of the right to work under s. 53 is continued under s. 55 [to the earlier part of which his Lordship referred]. The mine-owner can no longer work or get his seam of coal; it is not to be wrought or gotten, but is to be purchased and paid for by the company, and in default of agreement the amount of purchase-money and compensation is to be settled by arbitration. [His Lordship read the last sentence of the section, and continued:—]

Pausing there, directly the company has given its notice under s. 55—in the present case it was given on November 19, 1892—the mine-owner ceases to enjoy the seam of coal in the only way in which a seam of coal ungotten can be enjoyed by him, and the company becomes liable to pay compensation. There is only one other section to which I need refer, namely, s. 62, and that is not very relevant, for its only effect, as I read

BUCKLEY J. 1902 FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY.

it, is that when the company has paid the compensation the property vests in the company.

It was argued in the first place for the plaintiffs that they were entitled, under s. 55, to interest on the purchase-money. [His Lordship held that there were not any words in the section entitling the mine-owner to interest on the purchase-money by measuring loss which he sustained by the non-payment of the price of the seam, and continued :—]

But the question remains, What are the mine-owner's rights as regards interest under the general law? The principle laid down in the House of Lords in *Birch* v. *Joy* (1) is perfectly plain. When such a state of things arises between a vendor and purchaser as that the latter has become entitled in equity to the thing purchased and to the receipt of the rents (if there be such), or to the enjoyment (if there can be enjoyment) of the thing purchased, there arises in equity a correlative right in the vendor to have interest on his purchase-money if remaining unpaid. The head-note to the report of *Birch* v. *Joy* (1) runs thus: "It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase-money, and that the purchase-money being retained by him will carry interest to be paid by him to the seller. An agreement, which appears to prevent the application of this rule, will be examined in a Court of Equity, by its aid, and will or will not be enforced, according to circumstances." The general principle has been applied in multitudes of subsequent cases. The decision of Bacon V.-C. in *Rhys* v. *Dare Valley Ry. Co.* (2) is a fair instance of the application of the principle in the case of a purchase by a railway company. Interest was there held to be payable by a railway company on the purchase or compensation money from the time when the company took possession of the land under its statutory powers. It must always be ascertained whether the purchaser on the one hand has obtained the enjoyment of the property and the vendor on the other hand has not acquired the enjoyment of the purchase-money.

What were the facts in the present case? What is possession

(1) 3 H. L. C. 565. (2) L. R. 19 Eq. 93.

of a subterranean seam of coal? In a sense, the enjoyment or beneficial possession of it cannot be obtained without digging it up. Of course, this company does not wish to dig the seam. It wants it not to be dug, but to be kept for the purpose of supporting the canal. The mine-owner wanted to work the seam, and his way of enjoying it would be by cutting and hewing it and bringing it to the surface. The railway company's mode of enjoying it was by retaining it and using it by way of support. From November 19, 1892, the company has enjoyed the seam by way of support and has deprived the mine-owner of the enjoyment of it in his way—by getting the coal. So far as possession of such a thing as a subterranean seam can be had, the company has been in possession of it ever since November 19, 1892. The possession was, in my judgment, changed by ss. 53 and 55 of the Act, for the mine-owner could no longer go to the seam, and the railway company, although, of course, it did not go there, kept the seam where it was for the purpose of support, and, as it seems to me, had the possession of it. Then what is the right which accrues from that possession? From 1892 the company has enjoyed the seam and the mine-owner has been excluded from the enjoyment of it. From 1892 the company has continued to enjoy the purchase-money and the vendor has not enjoyed it—that is to say, ever since the company gave its notice the company has been in the possession, or occupation, or enjoyment, or whatever it may be called, of both the seam and the purchase-money. Upon equitable principles it seems to me that the company ought to pay to the mine-owner that which represents a proper return to him in respect of the purchasing company having ever since November 19, 1892, kept the purchase-money. That, according to the equitable rule, is represented by a payment by the company to the mine-owner of interest at 4 per cent. on the purchase-money. Therefore, the award which the arbitrator made with reference to interest was right as a matter of law.

In *Caledonian Ry. Co.* v. *Carmichael* (1), to which the company's counsel referred me, the facts were totally different

(1) L. R. 2 H. L., Sc. 56.

BUCKLEY J. 1902 FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY.

from those of the present case. The Caledonian Railway Company was to become a debtor to Sir William Carmichael on a certain event happening. The company acquired the surface of his land, in which there was subterranean stone, upon the terms that when a future event happened—namely, when a certain face of stone was exposed—the company should become debtor to Sir William in respect of the compensation payable. When the event happened, he did not take the steps necessary for ascertaining the amount payable. He never asked for payment. In those circumstances the ordinary rule applied—that a debt does not carry interest in the absence of a contract to pay it, unless by operation of law when notice has been given pursuant to the statute 3 & 4 Will. 4, c. 42. There was neither contract nor notice in *Caledonian Ry. Co.* v. *Carmichael* (1), and it seems to me that that is a case in which the principles upon which I decide this case have no application.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Peace & Ellis, Wigan.*

Solicitors for defendant company: *Woodcock Ryland & Parker, for Christopher Moorhouse, Manchester.*

(1) L. R. 2 H. L., Sc. 56.

F. E.

[1902] 1 Ch. 911. McCHEANE v. GYLES (No. 2).

Distinguished. DOLLFUS MIEG ET CIE. *v.* BANK OF ENGLAND [1951] 1 Ch. 33

McCHEANE *v.* GYLES (No. 2).

BUCKLEY J.

[1901 M. 1004.]

1902 March 12.

Practice—Parties—Adding Defendant—Joint and Several Liability of Trustees—Action against one Trustee only—Application to join Co-trustee for purpose of Contribution—Rules of Supreme Court, 1883, *Order* XVI., *r.* 11.

G. and C. were the trustees of a settlement. C. died, and X., his legal personal representative, lived in Ireland. M., the cestui que trust, brought an action against G., alleging a breach of trust by him and C., and claiming payment by G. of the amount lost by the breach. A third-party notice, by which G. claimed contribution from the estate of C., and the order giving leave to serve it on X. in Ireland, were set aside by the Court of Appeal without prejudice to an application by G., under Order XVI., r. 11, to add X. as a defendant to the action: *McCheane* v. *Gyles*, ante, p. 287.

On the application to add X. being made, it was opposed by the plaintiff:—

Held, that X. ought not to be added as a defendant against the plaintiff's wish.

Dix v. *Great Western Ry. Co.* (1886) 34 W. R. 712, and *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q. B. 321, distinguished.

THOMAS JONES, of Kilkenny (who died in 1863), by his will gave 1000*l.*, which, in case his daughter Sarah Elizabeth should marry, was to be vested in trustees for the benefit of herself during her life, and after her death for the benefit of her issue. And he appointed his son, Thomas Jones, his executor.

By articles executed in Ireland in 1865, prior to the marriage of Sarah with Thomas Shaw McCheane, and to which they and Thomas Jones, the executor, were parties, it was agreed that when the executor or future personal representative of the testator should realize out of the assets 1000*l.*, that sum should be paid to two trustees to be held on trust for Sarah for life, and after her death for her issue as she should appoint.

By a settlement executed in Ireland in December, 1874, to which T. S. McCheane and Sarah, Mary Jones (then personal representative of the testator), and Walter Gyles and John Cronyn were parties, Sarah appointed Gyles and Cronyn

BUCKLEY J. 1902 McCHEANE v. GYLES (No. 2).

trustees of the 1000*l.* (which it was stated had been paid to them by Mary Jones) to hold the same upon the trusts of the will as varied by the articles; and the two trustees thereby expressed their consent to act.

In December, 1874, Gyles and Cronyn invested the 1000*l.* on a second mortgage, said to be a contributory mortgage.

On June 22, 1877, John Cronyn died, and probate of his will was granted to Caroline Eliza Cronyn, who was his widow and executrix and resided in Dublin.

In 1896 the mortgaged property was sold, but the proceeds of sale were not more than sufficient to pay off the amount due on the first mortgage, and the trust fund of 1000*l.* was accordingly lost.

In March, 1901, Sarah by deed appointed the whole fund to her only son, Thomas Ernest McCheane, and at the same time assigned her life interest to him.

T. S. McCheane, Sarah, T. E. McCheane, Gyles, and Cronyn all resided in Ireland; but in March, 1901, Gyles, the surviving trustee, happened to be in England, and T. E. McCheane brought an action against him charging him with breach of trust by investing on an improper security, and claiming payment of the 1000*l.* with interest for six years prior to the issue of the writ of summons.

On June 24, 1901, Byrne J., in chambers, made an order giving Gyles leave to serve on Caroline E. Cronyn, in Dublin, a third-party notice, by which Gyles claimed contribution from her, as John Cronyn's personal representative, to the extent of one-half of any sum that might be recovered in the action, on the ground that John Cronyn, as one of the settlement trustees, was equally liable with Gyles for the alleged breach of trust.

The third-party notice was served on C. E. Cronyn, and a motion by her to have the notice and the order on which it was based set aside or discharged was dismissed by Buckley J. on November 22, 1901.

C. E. Cronyn appealed, and on December 19, 1901, the Court of Appeal discharged the order of Buckley J. and the third-party notice and the order giving leave to serve the same out of the jurisdiction; but the order on appeal was made "without

prejudice to any application which the defendant may make for the purpose of adding the appellant as defendant."

The case is reported on appeal. (1)

On January 16, 1902, the defendant Gyles served on the plaintiff a summons "for further directions in this action as to (1.) an order that Caroline Eliza Cronyn may be added as a party defendant to this action; (2.) staying the trial of this action until twenty-eight days after appearance by the said Caroline Eliza Cronyn."

The summons was adjourned into Court.

Austen-Cartmell, for the applicant. The Court of Appeal only dealt with the question of third-party notice, the plaintiff not being before the Court, and its order was made without prejudice to an application under Order XVI., r. 11, to add Mrs. Cronyn as a defendant. The application is made under that rule, which is wide enough to cover the present case. The question is whether the Court will add Mrs. Cronyn although the plaintiff will not do so himself, and objects to her being joined. The object of the present application is to place the defendant in a position to give Mrs. Cronyn a notice, claiming contribution towards any sum recovered from the defendant, under Order XVI., rr. 48 and 55.

If once Mrs. Cronyn is made a party, no leave to issue the notice will be required: *Towse* v. *Loveridge*. (2) If judgment can be obtained in England against her, that can be used against her in Ireland.

[BUCKLEY J. Where there is a joint and several liability and one of the persons liable is sued, what power have I to make the plaintiff join the other person? Supposing I did so, how could I make him allege anything against or claim anything from the new defendant?]

The object of the application is that the original defendant may get something from the new defendant. The Court may make the order although the plaintiff objects: *Dix* v. *Great Western Ry. Co.* (3); *Montgomery* v. *Foy, Morgan & Co.* (4)

(1) Ante, p. 287.
(2) (1883) 25 Ch. D. 76.
(3) 34 W. R. 712.
(4) [1895] 2 Q. B. 321.

BUCKLEY J. 1902 McCHEANE v. GYLES (No. 2).

[BUCKLEY J. referred to *Kendall* v. *Hamilton*. (1) Is not an application to add a defendant to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed?

Douglas, for the plaintiff, referred to *Moser* v. *Marsden*. (2)]

Moser v. *Marsden* (2) is inapplicable.

An order to add another person as defendant was made in *Dickson* v. *Law and Davidson* (3); but there was no opposition by the plaintiff in that case. The question raised in the action is whether there has been a breach of trust, and the questions whether John Cronyn was a party to it, and whether his estate is liable to contribute, are involved. The case is therefore within Order XVI., r. 11.

Douglas, for the plaintiff. The plaintiff objects to Mrs. Cronyn being added at all. The rule does not contemplate the adding of a defendant against the plaintiff's wishes. There is no doubt that there is a joint and several liability in this case, and where there is a several liability it follows that each person severally liable may be sued alone. The action is therefore properly constituted, and the only question raised is whether Gyles is liable for the breach of trust. There is no jurisdiction to make the order: *Norris* v. *Beazley* (4); *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (5); *Moser* v. *Marsden*. (2)

If there is jurisdiction, it ought not to be exercised in this case.

Austen-Cartmell, in reply, referred to *In re Harrison*. (6)

BUCKLEY J. If I could have seen my way to do so, I should have made the order which the defendant's counsel asks me to make. I regret that I am unable to make the order because it would have enabled the Court to determine a subsidiary question which may arise, and which could have been conveniently dealt with in the present action.

The cestui que trust, who is the plaintiff in these proceed-

(1) (1879) 4 App. Cas. 504, 516.
(2) [1892] 1 Ch. 487.
(3) [1895] 2 Ch. 62.
(4) (1877) 2 C. P. D. 80.
(5) (1886) 34 Ch. D. 261.
(6) [1891] 2 Ch. 349.

ings, says, "There were two trustees, John Cronyn and the defendant Gyles. They committed a breach of trust, and were under a joint and several liability in respect of it. Gyles is liable; I elect to sue him alone." The plaintiff is not bound to sue both the trustees. Cronyn, the other trustee, is dead, and Mrs. Cronyn, his legal personal representative, is in Ireland. In March, 1901, the plaintiff brought this action against Gyles, and Gyles shortly afterwards obtained from my brother Byrne an order giving him leave to serve on Mrs. Cronyn, out of the jurisdiction, a third-party notice claiming contribution from her as the legal personal representative of the deceased trustee, to the extent of one-half of any sum which the plaintiff might recover in this action. Mrs. Cronyn applied to me to discharge that order and to set aside the third-party notice. I refused to do so, but the Court of Appeal held that a third-party notice was equivalent to an original writ of summons, and that contribution from a single contributor was not within Order XI., r. 1, which provides for service of writs of summons out of the jurisdiction in certain cases, and discharged the order giving leave to serve the notice, "but without prejudice to any application which the defendant may make for the purpose of adding" Mrs. Cronyn "as defendant." (1)

Gyles now asks that Mrs. Cronyn may be added as a defendant to the action. The plaintiff opposes, and says that he will not himself add her as a defendant. As against the plaintiff, can I make the order asked for? I think not. There is no doubt a class of cases—*Wilson* v. *Church* (2) may be called the leading case—in which a person may be added as a defendant to an action without the plaintiff's consent. In a representative action—an action brought by one or more persons purporting to represent a class—one of the class may come forward and say, "The plaintiff does not represent me. Add me as a defendant." In that case the applicant may be added although the plaintiff objects. *Dix* v. *Great Western Ry. Co.* (3), to which Mr. Austen-Cartmell referred in his argument, falls within the same principle as *Wilson* v. *Church*. (2) In that

(1) Ante, p. 287. (2) (1878) 9 Ch. D. 552.
(3) 34 W. R. 712.

BUCKLEY J.
1902
McCHEANE v. GYLES (No. 2).

case the railway company had entered into separate covenants with Dix, Owen, and Jallion to make one and the same road. Dix brought an action against the company for specific performance and damages. Kay J., on the application of the company, notwithstanding the objection of the plaintiff, ordered Owen and Jallion to be added as defendants. The order in that case was made under the power given to the Court by Order XVI., r. 11, which says that "the Court or a judge may, at any stage of the proceedings, either upon or without the application of either party . . . . order . . . . that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." In *Dix* v. *Great Western Ry. Co.* (1) Kay J. said that it was impossible for the Court "effectually and completely to adjudicate upon and settle all the questions involved" without the presence of all the covenantees, because each was interested in the question how and where the road should be made.

Another case relied on, but which was not decided on the same ground, is *Montgomery* v. *Foy, Morgan & Co.* (2) That case is really an authority against the applicant. There was a contract of affreightment contained in a bill of lading between the plaintiff, who was the shipowner, and the shippers of a cargo. The latter were not originally parties to the action. The consignees, who were the defendants in the action, were agents for sale in this country for the shippers, who were the persons eventually liable for the freight. As the consignees did not take delivery on the arrival of the cargo, the shipowner placed it in the custody of a warehouseman with notice of a lien for freight under s. 493 of the Merchant Shipping Act, 1894. In order to get possession of the cargo the consignees deposited the amount claimed for freight with the warehouseman under s. 495 of the Act, and gave him notice to retain it under s. 496, as they did not admit that anything was payable. The shipowner brought an action against the consignees for a declara-

(1) 34 W. R. 712. (2) [1895] 2 Q. B. 321.

tion that he had a lien on and for payment of the deposit, there being a decision of the House of Lords that under such circumstances that was the proper remedy. The shippers, who were in fact the owners of the cargo, said, "Make us defendants; the shipowner is not entitled to what he claims, but only to receive out of the deposit the difference between the amount of the freight and what he owes us for damages for short delivery and injury to cargo; we want to counter-claim for damages." The Court of Appeal held that the shippers could be joined as defendants adversely to the plaintiff, and for this reason—that in the question what the plaintiff was entitled to receive out of the deposit there was involved the question whether he owed anything to the shippers. Kay L.J. commences his judgment by saying (1): "I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as defendant, that, if joined, he would have a counter-claim against the plaintiff. This is a peculiar case." And then he points out the peculiarities of the case. The decision is, I think, no authority for the proposition that if there is a joint and several liability of A. and B. to C., and C. elects to sue A. alone, A. is entitled to have B. joined as a co-defendant in order that he may claim contribution.

Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined," or that his "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

I cannot hold that the plaintiff ought to have joined Mrs. Cronyn as a defendant, and her presence is not necessary to enable the Court to decide whether Gyles is liable for a breach of trust. Moreover, if Mrs. Cronyn were joined as a defendant and the plaintiff did not make any allegation against her, she might ask to be dismissed from the action. Another ground for refusing to make the order, supposing I had power to make it, is that the writ was issued in March last, the statement of

(1) [1895] 2 Q. B. 325.

BUCKLEY J. 1902 McCHEANE v. GYLES (No. 2).

claim was delivered in May, and the defence in August, and the order ought not to be made in an action when it is ready to be set down for trial.

The application must be refused with costs, to be paid by the defendant in any event.

Solicitors for defendant: *Bircham & Co.*

Solicitors for plaintiff: *Atkinson & Dresser.*

F. E.

BUCKLEY J. 1902 *March* 14, 24.

In re SCOTT. SCOTT *v.* SCOTT.

[1902 S. 218.]

Infant — Maintenance — Accumulations — Contingent Life Interest — Right to Accumulations — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2.

A testator gave his residuary property to trustees, upon trust for conversion and to hold a portion of the proceeds upon trust for his children who being sons should attain twenty-five, or being daughters should attain twenty-one or marry, to be divided between them in equal shares, and he directed his trustees to retain the share of each daughter, upon trust to pay the income to her for life, and after her death for her children.

Two of the daughters, having attained twenty-one, claimed payment of the accumulations of such part of the income in the meantime of their shares as had not been applied for their maintenance:—

Held, that they were the persons who had become ultimately entitled to the property from which the accumulations had arisen within the meaning of s. 43, sub-s. 2, of the Conveyancing Act, 1881, and that the accumulations must be paid to them.

Semble, that the meaning of sub-s. 2 is as follows: The trustees shall hold the accumulations for the benefit of the person who in the events which happen becomes entitled to the income from the accumulation of which the accumulations arise.

THE testator, David Cooper Scott, by his will dated July 9, 1888, devised and bequeathed his residuary, real, and personal estate to trustees, upon trust for conversion, and, after providing for certain annuities, in trust to pay to his wife one moiety during her widowhood, and one-third if she should

marry again, of the income of his residuary trust funds during her life; and, subject to his wife's interest, he directed his trustees to hold his residuary trust funds upon trust for his children who being sons should attain twenty-five, or being daughters should attain twenty-one or marry, to be divided between them in equal shares. He then declared that his trustees should pay his wife, during the infancy of any of his children, a sum not exceeding half the income of the child's share for board and maintenance, and he directed his trustees to retain the share of each daughter upon trust to pay the income to the daughter for life, and, after her death, for her children. The will further contained power for the trustees to raise not exceeding a moiety of the vested or expectant share of a child, and apply it for the advancement or benefit of the child.

The testator died on June 22, 1890, leaving five children, of whom the two youngest, being daughters, respectively attained twenty-one on February 10, 1899, and October 21, 1901.

During the infancy of these daughters, Anita Christina Mary Scott and Eleanore Clementine Scott, sums were paid for their board and maintenance, and also, under an order of December, 1890, for their education, out of the income of their respective shares, leaving a sum of 666*l.* 18*s.* 8*d.*, accumulations arising from the share of Anita Scott up to February 10, 1899, when she attained twenty-one, and 1163*l.* 16*s.* 9*d.*, accumulations arising from the share of Eleanore Scott up to June 30, 1901. The two daughters took out an originating summons for the determination of the question whether the plaintiffs were respectively entitled to these sums, or how they ought to be dealt with as between them as tenants for life and their possible future children, or other the persons entitled subject to their life interests.

Sect. 43 of the Conveyancing Act, 1881, so far as material, is as follows: "(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years . . . . the trustees may . . . . apply for or towards the infant's maintenance, education, or benefit,

BUCKLEY J. 1902 SCOTT, *In re.* SCOTT *v.* SCOTT.

the income of that property, or any part thereof. . . . (2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof . . . . and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

Buckmaster, for the plaintiffs. It is submitted that the accumulations are income and belong to the tenants for life as and when they, if daughters, respectively attain twenty-one or marry. Each daughter's share is held by the trustees "in trust for an infant" "for life" "contingently on" her "attaining the age of twenty-one years." In such a case s. 43 of the Conveyancing Act, 1881, says that the trustees may apply for the infant's maintenance or benefit the income of the property or any part thereof. Therefore all the income may be applied for the infant's benefit. Then sub-s. 2 directs that the residue of the income—that is to say, what has not been applied for the infant's benefit—shall be accumulated. The accumulations may nevertheless be applied as if they were income of the current year—that is to say, they may be resorted to for the benefit of the infant. If that is not done, what happens? It is inconceivable that money which one day before the infant came of age might be applied for her benefit is the next day to go to some one else. The Act says that the trustees are to hold "the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise." That cannot mean that the accumulations are to be retained until some one becomes absolutely entitled after the daughter's death to her share in the original corpus. It may mean that the undisposed of accumulations are to be added to and held on the same trusts as that share of original corpus—in other words, to go to the settlement. But the Act does not say that, as it easily might have done; and it is submitted that a third construction is the only reasonable one,

namely, that the infant takes the accumulations on attaining twenty-one.

The words "the same" refer to the accumulations; and what is "the property from which the same arise"? The accumulations arise from income, and not, at any rate entirely, directly from the original corpus or capital. There are in fact two funds—the original capital, which may or may not be settled, and the accumulated income which goes to the destination pointed out by the statute, namely, "the person who ultimately becomes entitled to the property." "Property" there refers to the income fund. The person ultimately entitled to that is the person for the time being entitled.

In *In re Buckley's Trusts* (1) Fry J. had to consider the very similar wording of s. 26 of Lord Cranworth's Act, which directs the trustees to accumulate the residue of income "for the benefit of the persons who shall ultimately become entitled to the property from which such accumulations shall have arisen." Money had been given in trust for an infant, but subject to a proviso that if he died under twenty-one it should go to other persons. He died under twenty-one, and Fry J. held that the accumulations up to the time of the death belonged to the infant, and not to the persons entitled under the gift over. Dealing with the three different ways in which a legacy may be given, he says that where it is given to A. B. contingently on his attaining twenty-one, "the accumulations would be taken or not taken by the legatee according to whether the contingency happened or not," and he scouts the idea that the Act was meant to take away income from a person who would otherwise be entitled to it, and says that its principal object was to "save the insertion of clauses usually inserted in deeds and wills."

In *In re Wells* (2) the testator gave a share of residue to trustees on trust to pay the income to R. for life. R. attained twenty-one, and North J. held that, as regarded the accumulations which had arisen from the income of the share of residue, she was the person who had ultimately become entitled within the meaning of s. 43, sub-s. 2, of the Act of 1881. After saying

(1) (1883) 22 Ch. D. 583, 584. (2) (1889) 43 Ch. D. 281.

BUCKLEY J. 1902 SCOTT, *In re.* SCOTT *v.* SCOTT.

that *In re Buckley's Trusts* (1) is exactly in point, he says (2): "I am by no means satisfied that the expression in sub-s. 2, 'the property from which the same arise,' does not mean the income from which the accumulations have arisen." Now in that case, as these daughters take, R. only took for life, there being a trust on her death for her children.

It is plain, therefore, that where the interest for the tenant for life is vested, but liable to be divested, the accumulations of income go to the tenant for life on the attainment of twenty-one. In the case last cited North J. points out that the object of the Act of 1881 "was to shorten and simplify conveyances," and not "to alter the devolution of property."

In re Wells (3) was approved by the Court of Appeal in *In re Humphreys* (4), in which there was an immediate vested life interest in a granddaughter in a share of residue with remainder to her children. There, again, she, although only tenant for life, was held entitled to the accumulations, on the ground that sub-s. 3 excluded the operation of sub-s. 2 of s. 43.

In the present case the life estate was contingent, but the contingency has now happened, and if there is no case exactly in point, the observations of Fry J. support the view which is now submitted.

Beddall, for the trustees and the possible children of the applicants. The accumulations form an accretion to the original capital and are subject to the same trusts. In other words, on a daughter attaining twenty-one the accumulations go to the settlement. If the person ultimately entitled to the income had been intended to be benefited, the section would have used the word "income" instead of the word "property." Sub-s. 1 begins with the words "where any property is held by trustees." "Property" there undoubtedly means corpus. In the same sub-section the words "income of that property" are used, and there, again, "property" means corpus. There is no reason for giving a different meaning to "property" when used in sub-s. 2. The last words of sub-s. 2 aid this construction, for the permission to apply the accumulations as

(1) 22 Ch. D. 583.
(2) 43 Ch. D. 286.
(3) 43 Ch. D. 281.
(4) [1893] 3 Ch. 1.

if they were income arising in the current year would seem to be unnecessary unless the preceding words of the sub-section had capitalized the accumulations. In Hood and Challis on the Conveyancing and Settled Land Acts, 6th ed. p. 123, it is said: "Reading together the language of sub-ss. 1 and 2, it becomes apparent that the suggestion of North J. in *In re Wells* (1), that perhaps in the latter sub-section the word 'property' might not mean capital exclusively, attributes to the Act an intolerable degree of looseness in the use of language."

[BUCKLEY J. I do not understand that passage.]

The authors criticise *In re Humphreys.* (2) The ground of the decision in that case was that the gift of an immediate vested life interest was an expression of a "contrary intention" within sub-s. 3, so as to exclude the operation of sub-s. 2. Here the life interest is contingent, and there is nothing in the will shewing a "contrary intention."

Buckmaster, in reply.

Cur. adv. vult.

March 24. BUCKLEY J. (after stating the facts and the question for decision). The determination of this question involves the consideration of the true construction of s. 43 of the Conveyancing Act, 1881. The gifts in favour of the daughters are gifts to them, as members of a contingent class, of shares of residue. The contingency is that of attaining the age of twenty-one years. Under such a gift the income is accessory to the capital and belongs contingently to the legatees in whose favour the contingent gift is made. The question is how the income which thus follows the capital is applicable in the case of a settled share, regard being had to the statutory provision contained in s. 43 of the Conveyancing Act, 1881.

First, as matter of principle, the intention of s. 43 was not to affect the construction of wills: *In re Dickson.* (3) The object of the Act was to shorten and simplify conveyances, and not to alter the devolution of property. Primâ facie, therefore, when the daughter attained twenty-one, she, as tenant

(1) 43 Ch. D. 281, 286. (2) [1893] 3 Ch. 1.
(3) (1885) 29 Ch. D. 331, 338.

BUCKLEY J. 1902 SCOTT, *In re.* SCOTT *v.* SCOTT.

for life, would become entitled to receive payment of the income of the settled share accrued up to that date in respect of the contingent gift. For the respondents, however, who represent the possible unborn children of the daughters or other remaindermen, it is contended that under sub-s. 2 of s. 43 the accumulations are to be held for the benefit, not of the tenant for life absolutely in the events which have happened, but as corpus settled for all the persons entitled in succession under the settlement of the daughters' share—in other words, that the word "property" in sub-s. 2 means the corpus from which the accumulated income has arisen. Another argument, but too extravagant to admit of serious consideration, would be that the accumulations are held, not for the persons thus entitled in succession, but for the person "who ultimately becomes entitled to the property," that is to say, entitled to the corpus after the determination of the tenancy for life. In my judgment, neither of these contentions can be sustained. The fact is that if in s. 43 the word "property" is read as equivalent exclusively to "corpus" or "capital" its use is far from exact. Thus, the section opens with the words, "Where any property is held by trustees in trust for an infant . . . . for life." If "property" is equivalent to "corpus" or "capital," as contrasted with and to the exclusion of income, this language is not apt. If it is read to mean "corpus or its income, as the nature of the gift may require," the language becomes appropriate. Further, that the word "property" in sub-s. 2 cannot mean "corpus" in every instance may be shewn by taking a particular case. Thus, suppose that 1000*l.* is held by trustees for A., an infant, for life, and after his death for B., and suppose that A. survives the testator for ten years and then dies an infant—this is a case within s. 43, sub-s. 1. The income in such case during the ten years unquestionably belongs to A.—but B. is entitled to the corpus. If "property" in sub-s. 2 means corpus, B. is the person entitled to that, and would on such a construction take the income which accrued during A.'s lifetime. Rejecting, therefore, a construction which would read "property" in sub-s. 2 as always meaning corpus, I go on to consider whether it ever means corpus. I think

not. The property spoken of is that from which "the same" —that is, the accumulations—arise. Income arises, no doubt, from corpus, but the accumulations arise from setting aside and investing income as it is earned. The words of sub-s. 2 are not "the property from which the income arises," but "the property from which the same (i.e., the accumulations) arise." The property from which the accumulations arise is the income which is year by year set apart and forms the accumulated fund. The words of sub-s. 2 are, I think, to be read thus—"entitled to the property (namely, the income) by the accumulation of which the accumulated fund or accumulations arise." If the words be thus read, and for the word "ultimately" there be substituted "in the events which happen," all difficulty disappears. The words will then read thus, "and shall hold those accumulations for the benefit of the person who in the events which happen becomes entitled to the property (namely, the income) from the accumulation of which the accumulations arise." I think that is the meaning of the words.

I do not find that any authority is inconsistent with this view. The decision of Fry J. in *In re Buckley's Trusts* (1), decided upon s. 26 of Lord Cranworth's Act, is only that that Act applied to gifts absolute or contingent, and not to gifts vested but liable to be divested. The decision of North J. in *In re Wells* (2) is that a person entitled to a vested interest for life is on attaining twenty-one the person ultimately entitled to the property within sub-s. 2. North J., I think, thought as I do, that "property" means the income the accumulations of which are being dealt with. The Court of Appeal in *In re Humphreys* (3) was again dealing with an immediate vested life interest. That decision approved *In re Wells* (2), and, while I have felt some difficulty by reason of the fact that the decision was rested upon finding in the will an expression of a contrary intention within sub-s. 3 of s. 43, I do not think there is anything in it to preclude me from coming to the conclusion that "property" in sub-s. 2 means that property the accumulation of which has produced the fund. The Court

(1) 22 Ch. D. 583. (2) 43 Ch. D. 281.
(3) [1893] 3 Ch. 1.

BUCKLEY J. 1902 SCOTT, *In re.* SCOTT *v.* SCOTT.

in *In re Humphreys* (1) left open the point which I have here to decide. I therefore hold that the plaintiffs, who in the events which have happened are entitled to income, are entitled to the accumulated sums.

Solicitors for all parties: *Stevens, Bawtree & Stevens.*

F. E.

JOYCE J. 1902 *Feb.* 28; *March* 4, 5, 15.

GODWIN *v.* SCHWEPPES, LIMITED.

[1901 G. 2267.]

Easement—Light—Derogation from Grant—Implication—Building Agreement — Plan — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

By a building agreement dated in 1884, S. agreed to erect certain specified buildings on an estate belonging to O. which for the purposes of the building scheme was divided into plots, upon each of which a building of a certain character was to be erected. After some of the buildings had been erected, the scheme was departed from to the extent that S., with the consent of O., built upon a site comprising several plots a block of mansions with windows overlooking the adjoining vacant plots. At this time S. contemplated building a corresponding block of mansions upon the adjoining plots, and the wall of the block erected abutting on the adjoining plots was for half its length built as a party wall, while for the rest of its length provision was made for an open area between the block erected and the intended block, and the foundations of the intended block were so laid as to carry out this scheme. The windows of the erected block looked into this area, and over the adjoining site of the intended block. On May 5, 1886, O. conveyed the erected block of mansions to S. by a deed which contained no express general words, and no reservation to O. of any rights in respect of the adjoining plots, but embodied a plan shewing the party wall and the open area. The second block of mansions was never built, and O. subsequently sold the intended site thereof to S., from whom it was acquired by the defendants, who commenced to build upon it so as to obstruct the access of light to the windows of the mansions, but to a less extent than would have happened if the second block contemplated by S. had been erected. The plaintiffs, who were the successors in title of S., claimed an injunction on the ground that by s. 6 of the Conveyancing Act, 1881, an express grant of light was imported into the conveyance of May 5, 1886, and that O. could not

---

(1) [1893] 3 Ch. 1.

derogate from his grant by conveying the adjoining land freed from the easement:—

Held, that having regard to the circumstances existing at the date of the conveyance of May 5, 1886, it did not as against O. pass to S. any right to have the access of light unobstructed by any future building on the adjoining ground.

Birmingham, Dudley and District Banking Co. v. *Ross*, (1888) 38 Ch. D. 295, applied and followed.

TRIAL OF ACTION.

By a building agreement dated January 19, 1884, between Herbert Oxley, who was the owner of a building estate at Hammersmith, and Edgar Sage, a builder, it was agreed that during twenty-seven calendar months from the date thereof Sage, for the purpose only of building and executing works as therein stipulated, might enter upon all those plots of land delineated upon an annexed plan and numbered thereon 1–44. The plan of the estate was substantially as follows: Plots 1–5 inclusive fronted south upon Hammersmith Road. Plots 6–19 inclusive fronted east upon a road called Blythe Lane. The remaining plots were situated at the rear and to the west of plots 10–19. It was further agreed that Sage should within twelve months build upon each of the plots 1–9, and within twenty-seven months upon each of the plots 10–19, a dwelling-house or shop of a certain value, and also within the latter period should erect upon each of the plots 20–44 inclusive a coach-house and stable premises, dwelling-house or cottage, conformably to plans and elevations to be approved by Oxley's surveyor. It was also provided as to each of the said plots that, when the carcase of the dwelling-house and buildings or stables to be erected thereon should have been built, Oxley was to grant to Sage or his nominees a lease of the plot with the dwelling-house or buildings or stables thereon in the usual way. Clause 16 was to the effect that Oxley should become entitled, upon the happening of certain events therein specified, to determine the agreement, and might thereupon remove Sage from the further erection of or interference with all or any of the dwelling-houses, stables, and buildings then remaining incomplete, notwithstanding that a lease or leases thereof might have been actually granted, and might employ a builder

JOYCE J. 1902 GODWIN v. SCHWEPPES, LIMITED.

or builders to complete the building pursuant to the agreement. Clause 17 gave Sage an option of purchasing the fee simple of any plot if he thought fit instead of taking a lease thereof.

The plots numbered 1–8 were duly built upon and purchased by Sage pursuant to the option in clause 17. Sage then proposed to Oxley to erect upon plots 10, 11, 12, and part of plot 30, which was situated immediately to the rear, a block of mansions ultimately and now known as Addison Mansions. This was assented to, and these mansions were erected by Sage with the concurrence of Oxley. It was in respect of certain windows in the western side of these mansions that the present action was brought.

To the west of the site of the mansions were the rest of plot 30, plot 29, and plots 28, 27, and 26, which are hereinafter referred to collectively as the adjoining ground.

When the building of Addison Mansions was commenced, Sage contemplated the erection of another and corresponding block of mansions upon the adjoining ground, and he at the same time laid the foundations therefor in the adjoining ground with the concurrence of or without objection from Oxley. The western wall of Addison Mansions abutting on the adjoining ground was for about half its length built as a party wall having chimney breasts and apertures for fire-places on the side next to the adjoining ground. The remainder of the wall was set back from the western boundary of the site so as to leave unbuilt upon an open space or area of about four feet in width next to the adjoining ground.

The foundations on the adjoining ground were laid so as to leave or provide a similar and equal area on the adjoining ground in such a manner that the two areas together would, when both blocks of mansions were completed, form a space or court in the shape of a parallelogram with no buildings thereon.

Addison Mansions having been built, Sage exercised his option to take a conveyance in fee instead of a lease. That conveyance was effected by an indenture dated May 5, 1886, made between Oxley of the one part and Sage of the other. There was a plan upon the conveyance shewing plainly the

party wall and the area or open parallelogram above described. There were no express general words in the conveyance, but by virtue of s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, the parcels operated as conveying together with the mansions all lights appertaining or reputed to appertain thereto, or at the time of the conveyance enjoyed therewith. On May 6, 1886, a mortgage of the same premises was made by Sage to M. O. Sim and others. The description of the parcels in this mortgage was practically the same as in the conveyance, and the plans on the conveyance and mortgage were identical. The mortgagees had full notice of the building agreement, and of the condition of matters generally on the western side of the mansions, both the areas being shewn upon the plan on the mortgage deed. Subsequently, on September 28, 1886, this mortgage was transferred to other mortgagees, who at the same time made a further advance to Sage, he being a conveying party in the deed of transfer. There was a plan on this deed identical with that upon the conveyance. In 1891 the mortgaged premises were sold under the power of sale in the mortgage, Oxley himself being the purchaser, and the present owners, the plaintiffs in the action, were the trustees of a settlement made by him of the property and under which he was interested.

The adjoining land was now in the possession of the defendants as successors in title of Oxley and Sage. They had recently commenced to erect certain buildings thereon at a distance of about thirteen feet from the western wall of Addison Mansions, so as to obstruct the light coming to the windows of the mansions. The plaintiffs claimed an injunction to restrain the defendants from building on the adjoining ground so as to obstruct any of the lights or windows of the mansions as the same were enjoyed at the date of the conveyance of May 5, 1886.

Younger, *K.C.*, and *Rolt*, for the plaintiffs. By virtue of s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, an express grant was imported into the conveyance of May 5, 1886, of all lights appertaining to or enjoyed with the

JOYCE J. 1902 GODWIN v. SCHWEPPES, LIMITED.

mansions at the time of the conveyance, and the deed contained no reservation of light by Oxley, the vendor. Oxley could not derogate from his grant. At the date of the conveyance the building scheme was no longer in existence, the time within which the contemplated buildings were to be erected thereunder having expired. Where there is an express grant of light there can be no implied reservation: *Wheeldon* v. *Burrows*. (1) There being no express reservation to Oxley, the mere fact of the land being building land does not of itself negative the primâ facie right of the plaintiffs to have their lights unobstructed, and there is nothing in the conveyance or the building agreement to shew a "contrary intention" within the meaning of s. 6, sub-s. 4: *Broomfield* v. *Williams* (2), where *Birmingham, Dudley and District Banking Co.* v. *Ross* (3) was commented on and explained. In the latter case Cotton L.J. expressed the view that both parties knew that there was an obligation on the grantee to erect buildings which would necessarily cause an obstruction of light. In the present case it was Sage, the grantee, who erected the mansions and built the party wall. *Broomfield* v. *Williams* (2) was applied in *Pollard* v. *Gare*. (4) At the date of the conveyance Sage had no interest in the adjoining ground; if he had had any he would have been precluded from building thereon so as to obstruct the lights of the mansions by reason of the mortgage of May 6, 1886.

[They also referred to *Lawrence* v. *Horton*. (5)]

T. R. Hughes, K.C., and *Harman*, for the defendants. It is clear that Sage built under the agreement, and that at the date of the conveyance he intended to build on the adjoining ground a block of mansions corresponding to Addison Mansions. He had under the agreement an equitable interest in the adjoining land, and the case is therefore different from the simple case of the sale of a building overlooking other land belonging to the vendor. The right to light must be treated as limited by the circumstances existing at the date of the conveyance:

(1) (1879) 12 Ch. D. 31.
(2) [1897] 1 Ch. 602.
(3) 38 Ch. D. 295.
(4) [1901] 1 Ch. 834.
(5) (1890) 38 W. R. 555.

Birmingham, Dudley and District Banking Co. v. *Ross* (1), which was not so strong a case as the present, for it was apparent that no building could be erected on the adjoining ground without interfering to some extent with the access of light to the mansions. The building agreement was never abandoned, although the building of the corresponding block of mansions was temporarily postponed by Sage. The intention to erect such a corresponding block is clearly shewn upon the plan on the conveyance. The meaning and effect of s. 6 of the Conveyancing Act must be treated as restricted when dealing with a newly erected building: *Beddington* v. *Atlee* (2), *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), and *Myers* v. *Catterson.* (3)

The contemplated block of mansions would have formed a far more serious obstruction to the plaintiffs' lights than do the buildings of which they complain.

Younger, K.C., in reply.

JOYCE J. This action is instituted in respect of obstruction of the access of light to certain windows which are not ancient lights. The right to have the access of light thereto unobstructed must, therefore, if it existed, have been acquired by contract, or by the operation of the rule that a grantor shall not derogate from his own grant. [His Lordship then stated the facts, and continued:—]

It is contended on behalf of the plaintiffs, and it is to Oxley's interest at the present time to support this contention, that the grant of light by him, under the general words imported by the Conveyancing Act into the conveyance of May 5, 1886, operated against himself as an absolute and unlimited grant of light for the windows in the western side of Addison Mansions, and conferred the right to the access of light for the windows of the mansions looking into the area or open space without any obstruction from any building to be erected at any time thereafter upon the adjoining ground, or, in other words, that by that conveyance he was, and the persons who derive title from

(1) 38 Ch. D. 295. (2) (1887) 35 Ch. D. 317.
(3) (1889) 43 Ch. D. 470.

JOYCE J. 1902 GODWIN v. SCHWEPPES, LIMITED.

him to the adjoining ground now are, precluded from erecting on this adjoining ground, either the corresponding block of mansions of which the foundations were laid as I have mentioned, or any building against their moiety of the party wall, or any such stables or building as contemplated by the building agreement, or indeed any building that would in any manner whatsoever obstruct or interfere with the access of light over the adjoining ground to the windows of the mansions looking into the area or open space shewn upon the plans on the conveyance and mortgage of 1886.

The defendants are the present owners of the adjoining ground. They derive their title under a conveyance by Oxley to Sage in 1887, and a subsequent conveyance by Sage, neither of these, as I assume, containing or purporting to contain any reservation of any right to light over the adjoining ground for the windows of the mansions which were then vested in the mortgagees. The defendants have erected on the adjoining ground stables and a carriage or van house, these buildings being further away from the mansions and of smaller height than the corresponding block of mansions originally contemplated as before mentioned would have been if erected.

What was the legal effect of the conveyance and mortgage of May 5 and 6, 1886, in reference to any right of light for the windows of the mansions looking into the area or over the adjoining ground?

There are no express general words in any of the deeds; but by s. 6, sub-s. 2, of the Conveyancing Act, 1881, there are imported the words as to lights which I have already mentioned. Easements and privileges legally appendant or appurtenant to property pass by a conveyance of the property simply without any additional words; but before the Conveyancing Act of 1881 easements and privileges which were used and enjoyed with or reputed to appertain to the property without being legally appendant or appurtenant did not pass by a conveyance of the property without being expressly mentioned. It was decided in *Booth* v. *Alcock* (1) that a lease or grant of a house, together with all lights thereto belonging or therewith

(1) (1873) L. R. 8 Ch. 663.

used or enjoyed, is not a lease or grant of all light then actually falling upon the windows of the house, but only of such right to light as the lessor or grantor then had. That is to say, general words in a grant are to be restricted in equity as well as at law to that which the grantor had then power to grant.

As far back as the case of *Swansborough* v. *Coventry* (1) the law is laid down by Tindal C.J. thus: "It is well established by the decided cases, that, where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights." But in the very important case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (2) it was determined that, although a grantor shall not derogate from his own grant, this rule does not entitle the grantee of a house with the lights, under the words imported into the grant by the Conveyancing Act, 1881, to any easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. The expression "lights enjoyed" in the statute is confined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued.

In truth there is not in the conveyance of May 5, 1886, any express grant of the right of light now claimed. It is only a question of how far under the circumstances the maxim that the grantor cannot derogate from his own grant applies and operates; and upon consideration I think that the present case is governed by the decision in *Birmingham, Dudley and District Banking Co.* v. *Ross*. (2) The adjoining ground, as well as the site of the mansions, was the subject of the pre-existing building agreement between the grantor and grantee in the conveyance. The mansions had been built by the grantee, and their respective rights were to be looked for in the building agreement: see judgment of Rigby L.J. in *Broomfield*

(1) (1832) 2 Moo. & S. 362, 369; 35 R. R. 660. (2) 38 Ch. D. 295.

JOYCE J. 1902 GODWIN v. SCHWEPPES, LIMITED.

v. *Williams*. (1) Under the circumstances, having regard in particular to the provisions of the building agreement comprising and affecting as it does the plots which form the adjoining ground, the existence of the foundations laid in the adjoining ground, the obvious existence and the condition of the party wall, and the areas shewn in the plan on the conveyance of May 5, 1886, I have come to the conclusion that the conveyance of May 5, 1886, did not as against Oxley pass to Sage any right to have the access of light to the windows of the mansions looking into the area over the adjoining ground unobstructed by any future building on the adjoining ground, and not within the area contemplated as to be left thereon. I am confident that no such result was intended, nor do I think that the possibility of such a result could have entered into the contemplation of either of the parties. Suppose that immediately after the conveyance any of the events had happened by which Oxley had become entitled to enter upon the adjoining ground under clause 16 of the building agreement, he would have been entitled, in my opinion, notwithstanding the general words implied by statute in the conveyance, to have erected upon the adjoining ground at least such buildings as were particularly contemplated by the building agreement, and possibly even a block of mansions corresponding to block No. 1, that is to say, Addison Mansions.

Sage has been called as a witness on behalf of the plaintiffs, and obviously desires to support their contention, although the defendants derive their title under him. He deposes that in his own mind he had prior to the conveyance of May 5, 1886, abandoned all idea of erecting any block of mansions on the adjoining ground upon the foundations which he had laid as I have mentioned. I must say, however, that, if it be really material, I very much doubt the correctness of this statement of his. I mistrust his recollection with respect to the precise date of such abandonment, seeing as I do that the plan on the conveyance, which, by-the-bye, it is admitted that he himself prepared, shews what it does shew in reference to the party wall and the two areas. At all events, that is the plan by

(1) [1897] 1 Ch. 616.

reference to which the conveyance must be construed and its effect determined.

If I am right in my view of the effect of the conveyance of May 5, 1886, it follows that the mortgage of May 6, 1886, did not pass to the mortgagees as against Oxley and persons claiming through him any greater right or easement than was granted or created against him by the conveyance, and I am of opinion that under the circumstances, and especially having regard to the plan upon the mortgage and the obvious condition of the premises, the mortgagees could not, if so minded, have prevented Oxley and Sage, or their assigns, from erecting upon the foundations in the adjoining ground the contemplated block of mansions corresponding to the block first erected. In other words, there did not, in my opinion, result from such mortgage any implied obligation on Sage not to interfere with the lights of the mansions to the extent required for building upon the adjoining ground pursuant to the building agreement, or even for building the corresponding block of mansions, and I cannot see why the transferees of the mortgage or any purchaser from them should be in a better position than the original mortgagees.

Whatever right Oxley and Sage together had after the mortgage to build upon the adjoining ground is now vested in the defendants. It is plain that the present stables and buildings of the defendants on the adjoining ground do not form nearly so serious an obstruction to the access of light to the windows in question as the corresponding block of mansions would have done if erected on the same site. Consequently, in my opinion, this action fails, and must be dismissed.

Solicitors: *Morgan & Upjohn; Leonard & Pilditch.*

G. A. S.

JOYCE J.
1902
April 9, 19.

ANDERSON *v.* BERKLEY.

[1900 A. 996.]

Will—Construction—Misdescription—"Wife"—Named Legatee misdescribed as Wife.

A testator bequeathed a fund upon trust, after a trust to pay the income to his son, to pay the income "to my son's wife L. if she shall survive him." The son, who lived in the Colonies, had written to his father that he had married a lady named L. C. L. C. lived with the son as his wife till his death and was reputed to be his wife, but she was not married to him. The testator never had any direct communication with L. C. :—

Held, upon the construction of the will, that inasmuch as the identity of the legatee was established by her name, the annexed misdescription of her as the son's wife did not vitiate the gift, the Court not being at liberty to speculate as to the motive of the testator in making the gift.

Sir George Berkley, who died in December, 1893, by his will, dated November 22, 1892, bequeathed the sum of 5000*l.* to his trustees upon trust to invest and to pay the income to arise from the said 5000*l.* or the investments representing the same "to my said son Francis during his life. And from and after his death to pay such income to his wife Letitia during her life if she shall survive him. And after the death of the survivor of my said son Francis and Letitia his wife" upon trust for the children of Francis as therein mentioned, and in default of children upon trust for such of the testator's other children as should be then living.

Prior to the date of the will Francis had migrated to New Zealand. In November, 1888, he wrote from Dunedin to some members of his family in this country, including the testator, his father, stating that he had married Letitia Lilian Cumberland. It appeared that she was then living with Francis Berkley, and continued to live with him until his death as his wife, and they were reputed to be and were treated as lawfully married. The testator, however, never saw or had any direct communication with this lady.

Shortly after the death of Francis, which occurred in September, 1899, it was discovered that he and Letitia Cumberland

were never lawfully married, though they represented themselves to be so; and, indeed, in registering the birth of a daughter born of their union in the year 1894, the date and place of their marriage were stated to be "1880, January 19, London, England."

This action was brought by a mortgagee of Letitia's interest under the will to enforce his security. For this purpose it became necessary to determine the validity of the bequest to her, and this question was set down for hearing as a preliminary point of law.

T. R. Hughes, K.C., and *A. H. Jessel*, for the plaintiff. This is a bequest to a named person wrongly described as the testator's son's wife. That is a mere error of description, which will not vitiate the gift: *Giles* v. *Giles* (1); *In re Petts* (2); *Turner* v. *Brittain* (3); *Wilkinson* v. *Joughin*. (4) In the last case a bequest to a named person described as the testator's wife was held void by reason of the fraud of the legatee in concealing the fact that she had a husband living, but a bequest to her daughter by name under the description of the testator's stepdaughter was held good. We rely upon the second part of that decision, and as to the first part we say that it is contrary to the current of authority and ought not to be followed. There are two answers to any case of fraud that may be set up by the defendants—first, that the fraud, if any, was not the fraud of the legatee, but the fraud of Francis; secondly, that this Court has no jurisdiction to entertain the question; for it is established by the highest authority that, if a will, or any part of a will, be obtained by fraud, that is a question, not for the Chancery Division, but for the Probate Division: *Allen* v. *M'Pherson* (5); *Meluish* v. *Milton*. (6) Treating this, then, as a question of construction, there being no doubt as to the identity of the legatee, the Court will not inquire into the testator's motive, and will not presume that he based his gift upon his belief that there was a lawful marriage.

(1) (1836) 1 Keen, 685; 44 R. R. 134.
(2) (1859) 27 Beav. 576.
(3) (1863) 3 N. R. 21.
(4) (1866) L. R. 2 Eq. 319.
(5) (1847) 1 H. L. C. 191.
(6) (1876) 3 Ch. D. 27.

JOYCE J. 1902 ANDERSON v. BERKLEY.

[JOYCE J. referred to *In re Boddington.* (1)]

That was a gift during widowhood, and is distinguishable on that ground.

W. F. Hamilton, K.C., for persons entitled under the gift over. This gift fails because there never was a wife of the testator's son Francis. Where the object of the testator's bounty is clearly identified, a misdescription will not invalidate the gift; but I can find no case in which a legacy given to a woman by the description of wife, whether in conjunction with her name or not, has been upheld, where the object of the bounty was not personally known to the testator. That distinguishes all the cases cited by the plaintiff. This distinction is illustrated by the cases of *In re Davenport's Trust* (2) and *Doe* v. *Rouse.* (3) In determining whether this is a gift to the son's wife, whatever her Christian name, or to a person named Letitia, whether the son's wife or not, the Court is entitled to look at the probable motive of the testator in making the gift, and, having regard to the fact that the testator had never seen the lady, the only motive which can be reasonably imputed to him is to provide for the person who is in fact his son's lawful wife: *In re Davenport's Trust* (2); *Kennell* v. *Abbott.* (4) In *Kennell* v. *Abbott* (4), as in *Wilkinson* v. *Joughin* (5), on which I also rely, the fraud of the legatee was held to vitiate the gift. That case was recognised in *Allen* v. *M'Pherson* (6), and is still law. But I mainly rely, not upon any question of fraud, but upon construction. In *Turner* v. *Brittain* (7) the decision was based wholly upon the question whether or not the legatee had practised a fraud upon the testator, and the question of construction was not considered.

Whinney, for the trustees of the will.

Jessel, in reply. The suggested distinction based upon the testator's personal acquaintance with the object of his bounty is not to be found in the authorities, and is without foundation. The testator knew this lady sufficiently for the purpose of

(1) (1884) 25 Ch. D. 685.
(2) (1852) 1 Sm. & Giff. 126.
(3) (1848) 5 C. B. 422.
(4) (1799) 4 Ves. 802; 4 R. R. 351.
(5) L. R. 2 Eq. 319.
(6) 1 H. L. C. 191.
(7) 3 N. R. 21.

identification. The most important part of the description is the name, which is correct, and the person so named takes, although there is annexed to the name a description, which is incorrect, and all the more where the false description is one which has been generally accepted as true.

Cur. adv. vult.

April 19. JOYCE J. (after stating the facts as above set out). If entitled to conjecture upon the subject, it is possible and probable that what induced the testator to confer any benefit by his will upon this lady was the belief that she was the wife of his son. It is not, however, a legacy to any one under the simple description of "the wife of my son Francis" without any reference to a particular individual. If it had been, any person claiming must, I suppose, have shewn that she really sustained that character. The bequest is "to my son's wife Letitia if she shall survive him"—that is, to a legatee named with an additional description which is not satisfied, inasmuch as there was not any lawful wife of the testator's son Francis in the strict legal sense of the term, though, perhaps, in a secondary sense, Letitia Berkley or Cumberland might be called his wife.

Now, this is not the case of a competition between rival claimants to a gift where one part only of the description fits one claimant, and the other part of the description only fits the other, as in *Garland* v. *Beverley* (1), where the various considerations applicable to such a case will be found. The simple question here is whether in the circumstances Letitia Berkley can take under the gift in question, or whether it fails and goes to the persons entitled under the gift over.

There is no question of any fraud by the legatee in the obtaining of the bequest. It is not like the cases of *Kennell* v. *Abbott* (2) or *Wilkinson* v. *Joughin* (3), where a gift to a supposed husband or wife of a testatrix or testator not being actually such was held to fail by reason of a fraud practised on the testatrix or testator by the legatee: Jarman on Wills, 5th ed. p. 895, n.

(1) (1878) 9 Ch. D. 213. (2) 4 Ves. 802; 4 R. R. 351.
(3) L. R. 2 Eq. 319.

JOYCE J. 1902 ANDERSON v. BERKLEY.

The question is whether, according to the true construction of the will, the gift is in effect conditional upon Letitia being the lawful wife of the testator's son Francis. In *In re Boddington* (1) Earl Selborne L.C. held that upon the true construction of the will in that case the bequest of an annuity to the testator's wife, Emily Caroline Boddington, was expressly conditional upon her being and remaining his lawful widow. There are not any such words of condition here.

The legacy is intended for some person of whom the name, with a description, is given for the purpose of ascertaining and identifying the individual. We have a compound designation, consisting of the name "Letitia"—there is no doubt to whom that refers—and the description "wife of my son Francis." It is a rule, however, that, where the description is made up of more than one part, and one part is true but the other false, then, if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected, and will not vitiate the gift: Jarman on Wills, 5th ed. p. 742, cited and approved by Lindley M.R. in *Cowen* v. *Truefitt, Limited.* (2) And Lord Cottenham says in *Rishton* v. *Cobb* (3): "The rule, that, where the identity of the legatee is certain, the legacy will not be avoided by an inaccuracy in the description given to him, will be destroyed, if the Court permits itself to speculate, without proof, upon what may have been the object of the testator in giving the legacy." It is impossible to say positively what the testator in the present case would have done if he had known the precise facts in reference to the relation between his son and this lady.

I hold, therefore, that the gift to "my son's wife Letitia, if she shall survive him," does not fail, and my decision is in accordance with that of Lord Romilly in *Turner* v. *Brittain* (4), which is, I think, the nearest case to the present that is to be found in the books.

Solicitors: *McDiarmid & Hill, for F. C. Manley, Hull; Markby, Stewart & Co.*

(1) 25 Ch. D. 685.
(2) [1899] 2 Ch. 309, 311–2.
(3) (1839) 5 My. & Cr. 145, 151; 48 R. R. 256, 260.
(4) 3 N. R. 21.

H. B. H.

SWINFEN EADY J.

1902

March 19.

In re HUNLOKE'S SETTLED ESTATES. FITZROY *v.* HUNLOKE.

[1902 H. 372.]

Tenant for Life and Remainderman—Capital or Income—Fine on Surrender of Lease.

In the absence of mala fides, money paid to a legal life tenant as the consideration for accepting the surrender of a lease, granted without recourse to the powers of the Settled Land Acts, belongs to him as a casual profit.

ORIGINATING SUMMONS.

By his will dated July 4, 1845, a testator devised his real estates in strict settlement, and empowered (inter alios) any adult life tenant in possession to grant mining leases for terms not exceeding sixty years in possession at such yearly rent, or reserving such royalties and upon such terms and under such stipulations as should be thought reasonable, but without taking any fine or foregift, or anything in the nature of a fine or foregift. There was no provision as to the application of moneys paid by a lessee for the privilege of determining a lease. The trustees of the will had a power of sale with the consent of the life tenant in possession.

The testator died on February 8, 1856.

By an indenture dated December 1, 1899, the legal life tenant in possession granted a lease of certain seams of coal to certain lessees for the term of twenty-two years from July 1, 1898, subject to certain royalties, and also subject to a dead rent of 430*l.* a year for the first two years of the term, and a dead rent of 75*l.* a year for the remainder of the term, the royalties and dead rent to cease as soon as the coal was worked out. The lessees were entitled to determine the lease at the expiration of any year or half-year of the term by giving the lessor six months' notice in writing, paying the rent and royalties, and performing the covenants up to the expiration of that year or half-year, and also paying the lessor the dead rent for the whole residue of the term.

The lessor was defined to include the life tenant or other the

SWINFEN EADY J.
1902
HUNLOKE'S SETTLED ESTATES, *In re.*
FITZROY *v.* HUNLOKE.

person or persons entitled to the demised premises in reversion expectant on the term.

This lease was granted on the surrender of a previous lease at a dead rent of 430*l.*, which lease was not determinable by the lessees till July 1, 1900, and it was for this reason that the higher dead rent was reserved for the first two years of the present lease.

The lessees having given six months' notice determining the present lease on July 1, 1901, and having paid the life tenant the sum of 1462*l.* 10*s.*, being 37*l.* 10*s.* for the half-year then expiring and 1425*l.* for the remaining nineteen years of the term, this summons was issued to determine whether the life tenant was entitled to retain the latter sum for her own use, or whether any part thereof ought to be paid to the trustees of the will as capital.

Beaumont, for the trustees of the will. The 1425*l.*, being compensation paid in consideration of the acceptance of a surrender of a lease, should either be treated as capital money, or should be apportioned as if it were money received for the sale of settled leaseholds. In the latter case the life tenant is entitled to such an annuity as will exhaust the fund during the term. This is the view taken by Messrs. Hood and Challis in their note to s. 13 of the Settled Land Act, 1882. Mr. Wolstenholme, on the other hand, in his note to the same section, states that the money belongs to the life tenant; but there is nothing in Sugden on Powers, 8th ed. p. 763, or *Wilson* v. *Sewell* (1), on which he relies, to bear out his proposition. He also states that North J. in chambers is understood to have treated such a sum as capital money. (2)

(1) (1766) 1 W. Bl. 617.
(2) North J. In Chambers.

Aug. 8, 1898.

In re GUTHRIE'S SETTLED ESTATES.

[1898 G. 1475.]

ORIGINATING SUMMONS.

This was a case in which lands were devised in trust for sale subject to an agreement for a building lease, so that the equitable life tenants could only accept a surrender on obtaining the leave of the Court to exercise the powers of the Settled Land Acts. The old tenants having failed to build, a conditional contract was entered into by which it was agreed, subject to the approval and leave of the Court being obtained under s. 7 of the Settled

Vaughan Hawkins, for the life tenant. The Settled Land Acts do not deprive a legal life tenant of his common law right to accept a surrender of a lease, and, apart from mala fides, the life tenant is entitled to any consideration paid therefor. Of course, if the surrender were colourable, and accepted merely for the purpose of putting money in the life tenant's pocket, the case would be different. For example, if a large sum for dilapidations was about to become due at the end of a lease, the life tenant could not accept a surrender in consideration of a money payment, and pocket that money: *Shannon* v. *Bradstreet*. (1) Again, if a life tenant by virtue of his position obtains a payment of money which is really capital he will be held a trustee. For example, money paid to a life tenant for withdrawing his opposition to a bill for a railway passing through his estate is capital: *Pole* v. *Pole* (2); and the life tenant holds it as trustee, just as in the case of a life tenant of renewable leaseholds who obtains a renewal in his own name. This would also be the case if the surrender were accepted under the powers of the Settled Land Acts, the life tenant being a trustee of those powers. But a life tenant was never considered a trustee of an ordinary leasing power. He might make a lease to a trustee for himself, or he might accept a surrender and renew as often as he pleased: *Wilson* v. *Sewell*. (3) Apart, therefore, from mala fides or trusteeship, a

---

Land Act, 1884, that the life tenants should accept a surrender and should grant a similar agreement for a building lease to a new tenant for the rest of the term at a peppercorn rent for the first one and a half years, and afterwards at the old rent, the old tenants undertaking to pay the trustees the amount of the one and a half year's rent in advance to be applied as income in order to make up the loss of rent during the peppercorn period.

K. G. Metcalfe, for the equitable life tenants, referred to Wolstenholme on the Settled Land Act, 1882, s. 13, note; Sugden on Powers, 8th ed. p. 763, and *Wilson* v. *Sewell*, 1 W. Bl. 617.

The trustees were represented by their solicitors.

NORTH J. having varied the contract by directing the amount of the one and a half year's rent paid in advance to be treated as capital, approved it as so varied, and gave the required leave.

Solicitors: *Gasquet & Metcalfe.*

(1) (1803) 1 Sch. & Lef. 52, 72; 9 R. R. 11.
(2) (1865) 2 Dr. & Sm. 420.
(3) 1 W. Bl. 617.

SWINFEN EADY J.
1902
HUNLOKE'S SETTLED ESTATES, *In re.* FITZROY *v.* HUNLOKE.

legal life tenant is entitled to retain money paid in consideration of the acceptance of a surrender of a lease: Wolstenholme on the Settled Land Act, 1882, s. 13, note; Vaizey on Settlements, vol. i. p. 678; Bythewood and Jarman, 4th ed. vol. vi. p. 454. It is simply a casual profit analogous to fines and heriots paid by tenants for renewal: *Brigstocke* v. *Brigstocke* (1); compensation for the release of restrictive covenants imposed on grants by the trustees of a settlement: *Earl Cowley* v. *Wellesley* (2); or damages recovered for breaches of covenant: *Noble* v. *Cass* (3); all of which belong to the life tenant receiving them.

Beaumont, in reply. This is not a casual profit, but in substance a payment of dead rent in advance for the whole term as the consideration for accepting the surrender of an onerous mining lease. It has never been decided that compensation for accepting a surrender belongs to the life tenant. The mere fact that such heavy compensation is paid shews that the property will not readily let again, so that the inheritance is practically deprived of the dead rent. The compensation should, therefore, be apportioned.

SWINFEN EADY J. The question is whether the legal life tenant who granted this mining lease under the power in the testator's will can retain the sum of 1425*l.* paid by the lessees on determining the lease.

It is conceded that the case is outside the Settled Land Acts. The lease was made under a power in the will, and was determined by the lessees in pursuance of a provision in the lease. The life tenant had no option in the matter, and, therefore, no question of mala fides can arise.

The question is whether the life tenant can retain the 1425*l.* as a casual profit. According to the common law rule, money paid to a legal life tenant as the consideration for accepting the surrender of a lease belongs to that life tenant. I can find nothing to take the present case out of that rule. The trustees say that the 1425*l.* is merely the future dead rent

(1) (1878) 8 Ch. D. 357.
(2) (1866) L. R. 1 Eq. 656.
(3) (1828) 2 Sim. 343; 29 R. R. 115.

paid in advance for the unexpired term. But although the money payment to be made by the lessees on determining the lease is measured by the future dead rent without discount, it is none the less merely a money payment for the right to determine the lease. It is quite different from a fine paid on the grant of a lease. In that case the inheritance is burdened with a lease. In the present case the lease, which was unquestionably good under the power, has been determined, and the inheritance is unaffected. There being no ground for raising any equity against the life tenant, compelling her to hold the money as capital, the ordinary common law rule applies, and she is entitled to retain it.

Solicitors: *Tylee & Co.*

G. R. A.

In re GOSSLING.
GOSSLING *v.* ELCOCK.

[1893 G. 785.]

Will—Construction—Gift of Residue to Individuals in Shares—Gift of Income for Maintenance of all—Vested or Contingent.

Where a testator gives residue to several persons on their attaining twenty-one in equal shares, and directs the income during their respective minorities to be applied for the maintenance of all indiscriminately, the gift will not be vested; *secus*, if the direction be to apply the income of the respective shares of each for his or her maintenance.

Fox v. *Fox*, (1875) L. R. 19 Eq. 286, distinguished.

THOMAS GOSSLING by his will, dated August 22, 1860, appointed his brothers, William Gossling and John Gossling, trustees and executors of that his will, and after making a provision for Anne Gossling, his child by his deceased wife, gave all his residuary real and personal estate to his trustees, upon trust, after paying his debts, funeral and testamentary expenses, to permit his wife or reputed wife, Elizabeth Grandy (alias Gossling) to enjoy the same, and receive the income thereof during her life, if she should remain unmarried, for her

SWINFEN EADY J.

1902

GOSSLING, *In re.* GOSSLING *v.* ELCOCK.

support and maintenance, and the support, maintenance, and education of his two children by her, Ellen Gossling and John Thomas Gossling, and if she should intermarry to sell and dispose of his said residuary real and personal estate, and invest the proceeds, and to pay the income to his said wife or reputed wife for her separate use for her support and the support and education of his said two children; and the will proceeded as follows: "And from and after the decease of my said wife or reputed wife to pay, transfer and divide my said residuary real and personal property unto and equally between my said two children Ellen Gossling and John Tom Gossling, on their severally attaining the age of twenty-one years, their heirs, executors, administrators and assigns as tenants in common, the income during the respective minorities of my said two children to be applied in or towards their maintenance and support. I empower my said trustees and executors at any time during the respective minorities of my said two children to advance any portion of his or her presumptive share in or towards their advancement in the world."

The testator died on March 27, 1861, and on May 4, 1861, his will was duly proved by the executors therein named.

Elizabeth Gossling, in the will described as the testator's wife or reputed wife, was his deceased wife's sister, with whom he had gone through the ceremony of marriage.

Anne Gossling, the testator's legitimate child, survived him but died an infant, and without having been married, within a year of his death.

John Thomas Gossling died on July 9, 1870, under the age of twenty-one years, and without having married.

Ellen Gossling had been married to W. L. Klitz, and had settled her share in the testator's estate.

Elizabeth Gossling died on March 23, 1900.

The estate of the testator was being administered in an action commenced in 1893. This was a petition presented in the said action by the plaintiffs, who were the persons entitled to the share of Ellen Klitz under her marriage settlement, asking amongst other things for a declaration who was entitled to the share by the will given to John Tom Gossling.

J. G. Wood, for the petitioners.

L. Vernon Harcourt, for the next of kin of Anne Gossling (the testator's legitimate child). The gift was contingent, and failed on the death of J. T. Gossling under the age of twenty-one. In terms the gift of the share of capital is plainly contingent. The only question is whether the direction to apply the whole income for maintenance of the two children and the power of advancement vests their shares. There is no question that a gift which would upon its terms be contingent upon the donee's attaining a certain age may become vested by the gift of the whole interest in the meantime, whether direct or by way of maintenance.

But it is the gift of the whole income, not the gift of maintenance, which effects the vesting: *Watson* v. *Hayes* (1); and, by deduction from the rule there laid down, the cases have drawn a sharp distinction between cases where the income of a whole fund is directed to be applied indiscriminately to the maintenance of two or more children to whom the principal is given in shares, and cases where the income of each child's own share is directed to be applied in his or her maintenance. This rule was first laid down in *In re Ashmore's Trusts* (2), where the words are identical with those in this case, and was followed in *In re Parker* (3); *In re Morris* (4); *In re Martin* (5); *In re Mervin.* (6) In *Fox* v. *Fox* (7) Sir George Jessel M.R. dissented from *In re Ashmore's Trusts* (2), and *Fox* v. *Fox* (7) has recently been approved by the Court of Appeal in *In re Turney* (8); but the attention of the Court of Appeal seems to have been drawn only to the distinction taken by North J. in *In re Wintle.* (9) Sir G. Jessel himself distinguished *In re Parker* (3) from *Fox* v. *Fox* (7) in a way which implies that the rule he is supposed to have laid down in the latter case is too wide.

Lloyd v. *Lloyd* (10) shews that the same rule is applicable to real estate.

(1) (1839) 5 My. & Cr. 125, 133; 48 R. R. 249.
(2) (1869) L. R. 9 Eq. 99.
(3) (1880) 16 Ch. D. 44.
(4) (1885) 33 W. R. 895.
(5) (1887) 57 L. T. 471.
(6) [1891] 3 Ch. 197.
(7) L. R. 19 Eq. 286.
(8) [1899] 2 Ch. 739.
(9) [1896] 2 Ch. 711.
(10) (1856) 3 K. & J. 20.

SWINFEN EADY J.
1902
GOSSLING, *In re.*
GOSSLING *v.* ELCOCK.

The power of advancement is rather wider in the present case than in any of the cases cited; but in *Southern* v. *Wollaston* (1) the power was as wide as in this case, and it was not held to alter the rule.

R. J. Parker, for the Attorney-General and the Solicitor to the Treasury. There is a distinction with regard to the rule as to vesting between legacies and shares of residue. In the case of legacies it is necessary that they should be set apart. In the case of shares of residue a gift of the interest is enough. The Court is more inclined to infer vesting in the case of gifts to individuals than in the case of class gifts.

The rule laid down in the cases quoted only applies in the case of class gifts.

But this case is not within that rule. Each child is to be maintained out of half the fund. The phrase "respective minorities" makes the intention clear. The trustees could not apply more than half the income to the maintenance of either child, for the gift of a share of residue carries the intermediate income.

Pearman v. *Pearman* (2) shews that it is not a universal proposition that where a maintenance clause is not divided into shares the vesting is defeated. The Court always favours a construction which will vest children's shares.

G. Henderson, for the trustee.

Cur. adv. vult.

March 22. SWINFEN EADY J. The question raised on this petition is whether the late John Tom Gossling took a vested interest in one moiety of the residuary trust estate, or his interest was contingent on his attaining twenty-one. There is no gift except in the direction to pay on his attaining the age of twenty-one years, and primâ facie his interest is contingent. It was, however, argued that the direction as to maintenance which followed [His Lordship read it] had the effect of making the interest vested.

The question at once arises, Is the income divided into aliquot shares, of equal moieties corresponding with the corpus, or is

(1) (1852) 16 Beav. 166. (2) (1864) 33 Beav. 394.

the income of the entire fund given for the maintenance and support of the two children, and in such terms that it would not be a breach of trust to apply more than half the income for the maintenance and support of one of the children if the circumstances justified or required it? I am of opinion that, according to the true construction of the clause, the whole income, while both children were under age, might be applied in unequal proportions for their maintenance and support. There is power to apply the income in and towards their maintenance and support, and there is nothing to qualify or restrict this power, so as to require that not more than half the income shall be expended on either child. In other words, it is the whole income which is given for the maintenance and support of the two children during their minority, and not the income of a moiety of the fund during the minority of each child for the maintenance of the same child.

Under these circumstances I am of opinion that John Tom Gossling did not attain a vested interest. The case is not distinguishable from *In re Martin*. (1) In that case Kay J. reviewed the authorities. *In re Morris* (2), before Bacon V.-C., and *In re Parker* (3) support the same view.

It is said, however, that this view is opposed in *Fox* v. *Fox* (4), and that although that case has been commented upon more than once and dissented from by North J. in *In re Wintle* (5), it was nevertheless recently approved by the Court of Appeal in *In re Turney*. (6) The actual decision in *Fox* v. *Fox* (4) is not opposed to the opinion which I have formed in the present case, as there the power given to the trustees was to apply from time to time the income of the presumptive share of each child, or so much thereof as the trustee might think proper for his maintenance and education, until such share should become payable. It was not the case of a power to apply the income of an entire fund in the maintenance of several objects. And Lindley M.R. in *In re Turney* (6) does not approve of all the reasons for the decision, but says, "So

(1) 57 L. T. 471.
(2) 33 W. R. 895.
(3) 16 Ch. D. 44.
(4) L. R. 19 Eq. 286.
(5) [1896] 2 Ch. 711.
(6) [1899] 2 Ch. 739, 747.

SWINFEN EADY J.

1902

GOSSLING, *In re.* GOSSLING *v.* ELCOCK.

far as I have considered it, my impression is that the decision is very good sense and very good law."

Notwithstanding the argument that less will induce the Court to vest a share of residue than a legacy, and that vesting is more favoured in gifts to individuals than in gifts to a class, I am of opinion that there is not sufficient upon this will to confer a vested interest in John Tom Gossling in the event which has happened of his death under twenty-one, and I so decide.

Solicitors for petitioners and the trustee: *Bird & Eldridges, for Moore, Rawlins & Vores, Lymington.*

Solicitors for testator's next of kin: *Bird & Eldridges, for Burt & Haviland, Christchurch.*

Solicitor to the Treasury.

J. R. B.

SWINFEN EADY J.

1902

March 26.

GOPHIR DIAMOND COMPANY *v.* WOOD.

[1902 G. 570.]

Restraint of Trade—Covenant—"Interested" in similar Business—Servant—Fixed Salary.

A covenant not to become directly or indirectly "interested" in a similar business to that of the covenantee does not prevent the covenantor from becoming a servant at a fixed salary in a similar business.

Smith v. *Hancock*, [1894] 2 Ch. 377, applied.

MOTION.

This was a motion by the plaintiffs, who carried on a jewellery business with several branches in Regent Street, to restrain the defendant, who was recently a manager of one of those branches, from being, until the trial or further order, interested directly or indirectly in a similar business to that of the plaintiffs within twenty miles of Regent Street in breach of a covenant in that behalf in his managership agreement contained.

By an agreement under seal, dated April 12, 1900, and made between the plaintiffs of the one part and the defendant of the other part, it was agreed that the defendant should serve the

plaintiffs as manager of one of the Regent Street branches for three years from the date thereof, the engagement being terminable by either party at a month's notice, or by the payment by the plaintiffs of four weeks' salary in lieu of notice. It was further agreed that the defendant would not, after the determination by notice or otherwise of his engagement, either alone or jointly with or as agent or otherwise for any other person or persons, directly or indirectly solicit the custom of any of the plaintiffs' customers, or set up or become interested in, either directly or indirectly, a similar trade or business to that carried on by the plaintiffs within a distance of twenty miles from Regent Street, nor in anywise set up or become interested in, either directly or indirectly, any trade or business in opposition to, nor in any way interfere with, the trade or business of the plaintiffs during the term of three years from the date of the termination of his engagement.

The plaintiffs terminated the engagement on April 11, 1901.

On March 17, 1902, the defendant became one of the junior assistants or counter salesmen to other jewellers in Regent Street, close to one of the plaintiffs' branches, at a salary of 2*l.* a week, without commission or any other direct or indirect pecuniary interest in the business.

The question was whether this was a breach of the covenant.

Buckmaster, for the plaintiffs. The defendant is interested in the business of his present employers, as, if that business fails, he will lose his employment. He has therefore broken the covenant.

Martelli, for the defendant. The covenant does not follow the common form in Palmer's Company Precedents, 8th ed. Pt. I. p. 292, and preclude the defendant from being "engaged or concerned or interested" in a similar business. It merely forbids his being "interested." The word "interested" refers to a "proprietary or pecuniary" interest: *Smith* v. *Hancock* (1); *Hill & Co.* v. *Hill*. (2) The defendant's salary being independent of the profits or gross returns, he is not "interested" within the meaning of the covenant.

(1) [1894] 2 Ch. 377, 386. (2) (1886) 35 W. R. 137.

SWINFEN EADY J.
1902
GOPHIR DIAMOND COMPANY v. WOOD.

Buckmaster, in reply. In *Smith* v. *Hancock* (1) the husband had no remuneration whatever for his services. In the present case the defendant is a paid servant, and is pecuniarily interested in developing the business so as to retain his situation and possibly obtain an increase of salary.

SWINFEN EADY J. The real question is whether the defendant is directly or indirectly interested in the business of his present employers within the meaning of the covenant. I confess that during the argument I felt considerable doubt on the point. It is quite conceivable that the defendant's action may be prejudicial to the plaintiffs, as it is open to him to injure their business by disparaging their goods when selling those of his present employers. The rival shops are close together, and in any case the defendant's special knowledge of the plaintiffs' goods may well enable him to draw unfavourable comparisons. This, however, is not a sufficient ground for the interference of the Court, unless it comes within the terms of the covenant. I must not strain the language of the covenant merely because I think the defendant is acting improperly. The question is whether the covenant, fairly construed, covers the case. I am struck by this fact. The covenant departs materially from the common form. It does not provide that the covenantor shall not be "engaged or concerned or interested" in a similar business, but merely that he shall not be "interested" therein. Nor does it contain the usual provision against accepting employment as a servant in a similar business. If it was intended to prevent the defendant accepting employment of that nature it would have been quite easy to say so.

In *Smith* v. *Hancock* (1) Lindley and A. L. Smith L.JJ. treated the word "interested" as referring to proprietary or pecuniary interest, and held that notwithstanding the acts of the husband in assisting his wife to start a rival business he had not committed a breach of his covenant not to "carry on or be in anywise interested in" any similar business. A. L. Smith L.J. says (2): "If the husband had performed similar acts in like

(1) [1894] 2 Ch. 377, 386, 390. (2) [1894] 2 Ch. 391.

circumstances for a stranger who was setting up business on his own account, in my judgment it could not be said that he was in anywise interested in the business, though he had interested himself on behalf of the stranger." In other words, the mere performance of those acts of assistance was no breach of the covenant.

The plaintiffs contend that the observations only apply where the acts are gratuitous, and that if they are done by a servant for remuneration he is interested in the business. I am unable to come to that conclusion. The covenant, fairly construed, prohibits the defendant from being interested, directly or indirectly, in a similar business in the sense that he must not have a proprietary or pecuniary interest in the success or failure thereof. If his remuneration in any way depended on the profits or gross returns, he would be "interested" in the business, but the mere fact that he is employed as a servant at a fixed salary gives him no such interest and constitutes no breach of his covenant. I therefore refuse the motion.

Solicitors: *Downey & Linnell; E. W Pheasant.*

G. R. A.

BYRNE J.

1902

March 20.

FARMER *v.* PITT.

[1901 F. 1900.]

Mortgage—Consolidation — Redemption — Legal Mortgage—Subsequent Equitable Mortgage between the same Parties but of different Property—Agreement to execute Legal Mortgage as the Mortgagee may require—Clause excluding s. 17 *of the Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41).

The plaintiff mortgaged freeholds by a deed which contained no provision excluding the operation of s. 17 of the Conveyancing Act, 1881, which abolishes consolidation of mortgages. She subsequently made an equitable mortgage of other property to the same mortgagee, and signed a memorandum whereby she agreed at any time during the continuance of the security to execute a legal mortgage with such powers and provisions and in such form as the mortgagee might require for further securing the principal and interest.

Held (following *Whitley* v. *Challis*, [1892] 1 Ch. 64), that this covenant was not intended to enlarge the subject-matter of the security, and, therefore, that the mortgagee was not entitled to have executed by the plaintiff a legal mortgage containing a clause excluding the operation of s. 17.

On May 15, 1899, Mary Ann Farmer, wife of George Farmer, executed a legal mortgage in common form of freehold house property at Wallsall in favour of Frank Thornton Pitt to secure 900*l.* This mortgage contained no provision excluding the operation of s. 17 of the Conveyancing Act, 1881, which prohibits the consolidation of mortgages in the absence of an expressed intention to the contrary.

On July 14, 1899, George Farmer mortgaged property of his own to Pitt, and Mrs. Farmer on the same day signed a memorandum which stated that she had deposited with Pitt the title-deeds of property belonging to her with intent to create an equitable mortgage thereon by way of collateral security for the repayment by Mr. and Mrs. Farmer to Pitt of 100*l.*, which had been advanced by Pitt to Mrs. Farmer, with interest thereon as specified by the mortgage of the same date between Mr. Farmer and Pitt, " and also for the repayment of such further sum or sums as shall at any time or times here-

after whilst the said documents shall continue in the possession of the said F. T. Pitt be advanced by him to the said George Farmer, together with interest thereon as aforesaid, and the said Mary Ann Farmer doth hereby agree at any time or times during the continuance of this security, upon the request of the said F. T. Pitt, but at the cost of the said M. A. Farmer, to execute to him a legal mortgage of the said property, with such powers and provisions and in such form as the said F. T. Pitt may require for further securing the said principal moneys and interest." The memorandum did not exclude the operation of s. 17. Mrs. Farmer's property, the subject of this equitable mortgage, was distinct from her property included in the mortgage of May 15.

There were numerous mortgage transactions between G. Farmer and Pitt, and it was stated that two or more of the deeds contained clauses excluding the operation of s. 17. Mrs. Farmer was desirous of paying off the 900*l.* secured by the mortgage of May 15, and on December 5, 1901, her solicitors tendered to the mortgagee 926*l.* 2*s.* 2*d.* in payment of the principal and interest, and asked him to return the title-deeds of the property. He kept the money tendered, but declined to give up the deeds; and he claimed to have a legal mortgage of the property the subject of the equitable mortgage executed to him by Mrs. Farmer, and that that mortgage should contain a clause expressly providing that s. 17 of the Conveyancing Act should be excluded. The object of this clause was to enable Pitt to consolidate the mortgages and to prevent Mrs. Farmer from redeeming the property comprised in the mortgage of May 15 without at the same time paying off the equitable mortgage. Mrs. Farmer objected to the insertion of the clause, and took out a summons for redemption and reconveyance of the property the subject of the first mortgage.

Levett, K.C., and *A. Underhill*, for Mrs. Farmer. The defendant has no right to consolidate these mortgages and refuse to allow us to redeem the first mortgage alone. That mortgage is a simple legal mortgage, and does not contain any provision excluding the operation of s. 17 of the Conveyancing

BYRNE J. 1902 FARMER v. PITT.

Act, 1881. Nor does the equitable mortgage contain any such clause. Therefore, on the face of the documents, the section applies, and the defendant cannot consolidate. The covenant by Mrs. Farmer to execute such a legal mortgage as he may require does not authorize the insertion of such a clause. The meaning of these covenants is explained in *Whitley* v. *Challis*. (1) They do not enlarge the subject of the charge: they only provide for perfecting it. If Pitt is allowed to consolidate these mortgages, the result will be that the property comprised in the first mortgage will practically become subject to the second mortgage, and the security will thus be enlarged. If the clause is inserted it will prevent us from redeeming that mortgage without at the same time redeeming the first mortgage: *Griffith* v. *Pound* (2) But there is no authority for the converse proposition that such a clause in a subsequent mortgage can prevent the redemption of a former mortgage alone which does not contain the clause. *Griffith* v. *Pound* (3) and *Bird* v. *Wenn* (4) do not go so far as that. Therefore the clause, even if inserted, will not help the defendant. A covenant to execute a legal mortgage must be construed reasonably, and it is not usual for conveyancers to insert in mortgages clauses providing for the exclusion of s. 17.

Rowden, K.C., and *Martelli*, for F. T. Pitt. The covenant in the memorandum is not confined to usual clauses, and we are entitled to have this provision inserted in the mortgage. We are, therefore, in the same position as if we had a legal mortgage of the property comprised in the equitable mortgage, and that mortgage contained a provision that s. 17 should not apply to it. The covenant is in the widest possible terms, but it must no doubt be construed reasonably. No qualification of our right to determine the form of the mortgage should be permitted beyond the condition that it must be reasonable. A clause excluding s. 17 is a reasonable clause to insert in a mortgage, and it is usually inserted by conveyancers where there is any chance of further transactions between the parties. In this case the equitable mortgage itself provides for subsequent

(1) [1892] 1 Ch. 64.
(2) (1890) 45 Ch. D. 553.
(3) 45 Ch. D. 553, 556, 560.
(4) (1886) 33 Ch. D. 215, 219.

advances to Mr. Farmer, and there had already been several mortgages by him, some of which contained this clause. In the same way it is usual to exclude the operation of parts of s. 18 of the Conveyancing Act.

[BYRNE J. referred to *In re Nugent and Riley's Contract.* (1)]

In Key and Elphinstone's Precedents in Conveyancing, 6th ed. vol. ii. p. 59, it is stated that a clause of this kind is usually inserted in mortgages where there is a likelihood of other mortgages between the same parties, and that is the case here. The note in Davidson's Concise Precedents in Conveyancing, 17th ed. p. 227, says that the clause should be used with discrimination. Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. p. 63, is to the same effect. It is clear that the practice of conveyancers is to insert the clause commonly enough for it to be reasonable of Pitt to insist upon its use in these circumstances.

There is no question of bringing in other property and making it subject to the charge; the object is to preserve to the mortgagee the right which was his before the Conveyancing Act. After consolidation the mortgages stand on the same footing as if the whole property were included in one mortgage: the mortgagor has had the mortgagee's money, and cannot pay off part of it, and take away part of the security and leave the remainder insufficiently secured: *Griffith* v. *Pound* (2); *Cummins* v. *Fletcher.* (3) In *Whitley* v. *Challis* (4) additional property was actually brought into the security, and we do not contend that we can do that.

If the clause is in the subsequent mortgage, it has the effect of preventing Mrs. Farmer from redeeming the former mortgage without at the same time redeeming the subsequent mortgage. It is not necessary that the clause should be in the former mortgage. The words of s. 17, sub-s. 2, are: "This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them."

In *Griffith* v. *Pound* (5), which was a decision on a question

(1) W. N. (1883) 147.
(2) 45 Ch. D. 553, 561.
(3) (1880) 14 Ch. D. 699, 712.
(4) [1892] 1 Ch. 64.
(5) 45 Ch. D. 556.

BYRNE J. 1902 FARMER v. PITT.

of election, the clause was in the later mortgage. In the present case there are "deeds" within s. 17, sub-s. 2, for equity looks upon that as done which is agreed to be done, and the Court will treat the legal mortgage as already executed.

Levett, K.C., in reply. The further advances provided for in the memorandum were to be made to the husband. There was no series of transactions between the plaintiff and Pitt such as is referred to in the text-books. A clause excluding the operation of s. 17 can only be inserted by express contract, and there is no express contract for that purpose in the memorandum.

BYRNE J. In this case the lady made a mortgage of property A. That mortgage contained no declaration doing away with the effect of s. 17 of the Conveyancing Act, 1881. Subsequently, on July 14, 1899, she executed an equitable mortgage, expressed to be in consideration of a sum of 100*l.* paid to her, which provided for securing further advances to be paid to her husband by the mortgagee. It concludes with this: "And the said Mary Ann Farmer doth hereby agree at any time or times during the continuance of this security upon the request of the said Frank Thornton Pitt, but at the cost of the said Mary Ann Farmer, to execute to him a legal mortgage of the said property, with such powers and provisions and in such form as the said Frank Thornton Pitt may require for further securing the said principal moneys and interest." By-and-by the lady sought to redeem the first mortgage without redeeming the second mortgage. It is argued that by virtue of this clause that I have just read in the equitable mortgage giving the mortgagee a right to a legal mortgage on the same property, with such powers as may be required for further securing the principal moneys and interest, he might have required to have executed a mortgage in which there should be a provision that s. 17 should have no application. The question is whether the case ought to be treated as though a mortgage had been executed containing an express stipulation to that effect. It is said that the mortgagee is made master to determine what powers and provisions are to be put in the legal mortgage to be

executed, but it is conceded that they must be reasonable provisions. Then it is said that in considering what are reasonable provisions we must consider what the state of the law was prior to the time when this mortgage was executed, prior to the year 1881. In those days, in the absence of a contract the right of consolidation existed. Since 1881 the Legislature has seen fit to say that there shall be no such right apart from contract, but, nevertheless, it shall be lawful for the parties to contract (I am not using the exact words) that a right of consolidation shall exist.

The way it is worded is by providing that the mortgagor seeking to redeem one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him on property other than that comprised in the mortgage which he seeks to redeem. Then it says: "This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them."

Now, what is the true meaning of a clause such as I find in this equitable memorandum? It is very much such a clause as was contained in the memorandum of agreement in the case of *Whitley* v. *Challis* (1): "And such mortgage shall be in such form and contain such powers, covenants, and provisions as the solicitor or counsel of the said W. Maxwell shall advise or require." Fry L.J., in dealing with it, says (2): "Then it is attempted to enlarge the subject-matter of the security by the words which provide for the execution of a formal mortgage, and for the insertion in that mortgage of such powers, covenants, and provisions as the solicitor or counsel for the mortgagee shall advise or require. That clause is only intended to give effect to the previous charge, and does not enlarge the subject-matter of the charge. Therefore it appears to me to be plain that no solicitor or counsel for the mortgagee could successfully insist on any provision including the goodwill of the business."

The subject-matter in that case was an intended hotel and premises, and it was sought to say that the mortgagee was entitled to introduce into a subsequent mortgage the goodwill

(1) [1892] 1 Ch. 64. (2) [1892] 1 Ch. 72.

BYRNE J.
1902
FARMER
v.
PITT.

of the business. It was held, on the ground that he was seeking to enlarge the subject-matter of the mortgage, that he could not do that. What is proposed in this case is not in terms to mention the property in the first mortgage and put it into the second mortgage, but the result is the same. As has been properly pointed out, the true right in respect of consolidation is a right for a mortgagee to say, "I will hold security A as well as security B—I will not be paid off one without being paid off the other." The effect is to give the mortgagee, in the event of redemption being sought, a right of control over property not included in the security, and I think that the same principle which was applied in *Whitley* v. *Challis* (1) applies exactly, and I cannot say that I think a covenant of the sort I have to deal with is meant to authorize the introduction into the mortgage to be executed in pursuance of it such a clause as this, which the Legislature says shall be the subject of a special contract if it is wished to get rid of the ordinary law on the subject.

With reference to what has been said as to conveyancers' practice, I have no strict evidence of conveyancing practice, but one or two books of precedents have been referred to, and, as far as I can see, those books which were referred to in favour of the view put forward for the consolidation really tell rather against than in favour of that contention. I read this from Key and Elphinstone's Conveyancing Precedents, 6th ed. vol. ii. p. 59, under Miscellaneous Clauses: "And it is hereby agreed that the restriction on the right of consolidating mortgage securities which is contained in s. 17 of the Conveyancing and Law of Property Act, 1881, shall not apply to this security." The note says, after reference to another text-book: "The clause in the text is not inserted for general use, but occasionally, where (as in the case of builders) there is a likelihood of several mortgage transactions occurring between the same parties, its insertion may be proper. The right of consolidation is abolished, where either or both of the mortgages is made since 1881 by the Conveyancing Act, 1881, s. 17, but only if a contrary intention is not expressed in the mortgages or one of

(1) [1892] 1 Ch. 64.

them; so that the right might be created by express declaration." That is not anything like a statement that it is a common form ordinarily to be inserted in a mortgage. The other precedent book which I was referred to is very much to the same effect, and it does not add to the strength of the argument.

I think, therefore, that the mortgagor was right in this case, and that she is entitled to redeem and have the property comprised in the first mortgage reconveyed to her.

Solicitors: *Rowcliffes, Rawle & Co., for J. F. Addison, Walsall; R. H. Bentley, for S. Ward, Dudley.*

H. C. R.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1902, will be as follows:—

In the First Series,
[1902] 1 Ch. [1902] 2 Ch.

In the Second Series,
[1902] 1 K. B. [1902] 2 K. B. [1902] P.

In the Third Series,
[1902] A. C.

INDEX.

ABSOLUTE GIFT—Power to use capital if income not "sufficient"—Power of appointment *See* WILL. 1. 76

—— Secret trust—Charity—Trust for benefit of public, but so that they should acquire no rights - - - - 403
See WILL. 2.

ACCUMULATIONS — Right to — Infant — Maintenance—Contingent life interest 918
See INFANT. 1.

ADEMPTION—Lease in consideration of premium —Operation of appointment on premium
See POWER OF APPOINTMENT. 4. 100

ADMINISTRATION—Costs—Real and personal estate—Apportionment—Land Transfer Act - - - - - - 92
See PRACTICE. 2.

—— Costs out of estate—Costs "as between solicitor and client"—Originating summons - - - - - 436
See POWER OF APPOINTMENT. 3.

—— Intestacy — Advancements to children — Hotchpot - - - - 218
See DISTRIBUTIONS, STATUTE OF.

—— Trustee—Discharge—No new trustee appointed—Jurisdiction - - 692
See TRUSTEE. 4.

—— Trustee carrying on testator's business—Defaulting trustee—Creditors—Indemnity - - - - - 342
See TRUSTEE. 1.

ADMINISTRATOR — Right to receive fund — Power — Execution — General power — Married woman—Appointment by will
See POWER OF APPOINTMENT. 1. 552

ADMISSIBILITY—Evidence—Charitable legacy —General or limited charitable purposes
See CHARITY. 1. 214

ADVANCEMENTS—Hotchpot—Intestacy 218
See DISTRIBUTIONS, STATUTE OF.

ADVANCES—Building society—Infant member —Power to mortgage for advances—Purchase-money—Lien - - 1
See BUILDING SOCIETY.

ADVOWSON—Patron—Infant—Trustees to present during minority—Guardian 400
See ECCLESIASTICAL LAW.

AFTER-ACQUIRED PROPERTY — Covenant — "During the marriage"—Judicial separation - - - - 82
See SETTLEMENT. 1.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGGREGATION—Charges—Collective devise of real estates—Exoneration of personal estate - - - - 203
See WILL. 3.

ALTERATION—Name of party—Misdescription
See DEED. 451

ANCIENT LIGHTS — Prescription — "Substantial" interference—Angle of 45 degrees
See LIGHT AND AIR. 302

ANTICIPATION — Restraint on — Rule against perpetuities—Severance of class - 543
See HUSBAND AND WIFE.

APPEAL—Order whether final or interlocutory —Solicitor — Summons for delivery of bill of costs and taxation - - 29
See PRACTICE. 1.

APPOINTMENT—Power of.
See Cases under POWER OF APPOINTMENT.

APPORTIONMENT—Costs—Administration action—Real and personal estate—Land Transfer Act - - - 92
See PRACTICE. 2.

—— Costs—Public authorities protection—Solicitor and client costs - - 197
See COSTS.

ARREARS—Interest—Several estates comprised in same devise - - - 347
See SETTLEMENT. 2.

ARTICLES OF ASSOCIATION—Questions affecting class of shareholders - - 898
See PRACTICE. 5.

ARTIFICIAL WATERCOURSE — Riparian proprietor—Right to use of water—Nature of presumed lost grant - - 649
See WATER.

ASSIGNMENT — Covenant against — Demise of exclusive right of fishing—Grant by lessee of limited licence to fish - 727
See LANDLORD AND TENANT.

—— Friendly society—Life policy—Nomination
See FRIENDLY SOCIETY. 135

ATTESTATION — Unattested will — Domiciled foreigner—Leaseholds - - 24
See CONFLICT OF LAWS. 1.

AUSTRIA—English fund belonging to Austrian who has died without heirs—Right of succession — "Mobilia sequuntur personam" - - - - 847
See BONA VACANTIA.

BANK—Cheque drawn by deceased, Gift of—Non-payment in his lifetime—Overdrawn account - - - 889
See DONATIO MORTIS CAUSÂ. 2.

BANK OF ENGLAND—Transfer of stock—Attorney—Innocent misrepresentation 610
See PRINCIPAL AND AGENT. 1.

BANKRUPTCY — Shareholder — Claim to lien under articles for bankrupt's liabilities to company—Trustee's right to registration - - - - - 467
See COMPANY. 10.

BILL OF EXCHANGE—Dishonour—Person acting as secretary of two companies—Knowledge in one character—Presumption of notice in other character 507
See COMPANY. 14.

BONA VACANTIA—*English Fund belonging to Austrian who has died without Heirs—Right of Succession*—"*Mobilia Sequuntur Personam.*"

An Austrian who was entitled to a fund in court in this country died in Vienna, a bastard intestate and without heirs. By Austrian law the succession of an Austrian citizen in such a case is confiscated as heirless property by the fiscus. The Austrian Government having claimed the fund:—

Held, that as the right claimed was not in the nature of a succession, the maxim "Mobilia sequuntur personam" did not apply, and that the Crown, by the law of England, was entitled to the fund as bona vacantia. *In re* BARNETT'S TRUSTS - - - - Kekewich J. 847

BOND—To secure fidelity of employee—Death of surety—Determination of liability
See PRINCIPAL AND SURETY. 733

BOOK—Author and publisher—Encyclopædia—Ownership of copyright in contributions
See COPYRIGHT. 1. 264

BORROWING—Agent—Power of attorney—Excess of authority—Misappropriation—Liability - - - - 816
See PRINCIPAL AND AGENT. 2.

BREACH OF TRUST—"Action to which no existing Statute of Limitations applies"
See TRUSTEE. 3. 176

—— Improper investment by trustees—Power to invest on real security in Ireland—Puisne mortgage - - - 785
See TRUSTEE. 2.

BUILDING AGREEMENT—Light — Derogation from grant—Implication—Plan - 926
See EASEMENT.

BUILDING SOCIETY—*Infant Member—Power to Mortgage for Advances—Purchase of Land by Infant—Purchase-money paid by Building Society—Lien for Purchase-money—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 14, 15, 21, 38—*Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

Notwithstanding s. 38 of the Building Societies Act, 1874, which provides that an infant may be admitted as a member of a building society the rules of which do not prohibit such an admission, "and may give all necessary acquittances," an infant member of a building society registered under that Act cannot execute a valid mortgage of his real estate to secure advances made to him by the society. Such a mortgage is absolutely void as against the infant under the Infants Relief Act, 1874.

An infant member of a building society purchased land, part of the purchase-money being paid for her by the society to the vendor. The land was conveyed to her on July 21, and the next day she executed a mortgage of it to the society to secure advances by them. She did not represent to the society that she was of full age, but they were in fact then ignorant that she was an infant. After the execution of the mortgage the society from time to time made advances to her which were applied in erecting buildings on the land. In October the society discovered for the first time that the mortgagor was an infant. They then discontinued making advances to her, took possession of the property and expended money in completing the houses on it. When the infant attained twenty-one she brought an action against the society to set aside the mortgage as being void against her, and claiming possession of the land and delivery up of the title-deeds.

Joyce J. dismissed the action, [1901] 1 Ch. 88, on the ground that the purchase and the mortgage formed really one transaction, and that the plaintiff could not repudiate one part of the transaction while retaining the benefit of the other part:—

Held, by the Court of Appeal, that the purchase and the mortgage were two distinct transactions, and that the mortgage was absolutely void as against the plaintiff, and must be delivered up to be cancelled.

But, *held*, that the building society were entitled to a lien upon the property and the title-deeds for the purchase-money which they had paid for the plaintiff to the vendor, with

BUILDING SOCIETY—*continued.*
interest thereon. THURSTAN *v.* NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY - **C. A. 1**
—— Share certificates—Post Office Savings Bank deposit-book—Evidence—Delivery **680**
See DONATIO MORTIS CAUSÂ. 1.

CAPITAL—Absolute gift—Power to use capital if income not "sufficient"—Power of appointment - - - **76**
See WILL. 1.
—— Application of capital money—Alterations and additions with a view to letting—Electric light installation - - **97**
See SETTLED LAND. 2.
—— Fixed capital—Circulating capital—Dividends - - - - **353**
See COMPANY. 6.
—— Improvements—Income or capital chargeable - - - - - **711**
See SETTLED LAND. 1.
—— Income or capital—Fine on surrender of lease—Tenant for life and remainderman - - - **941, 942, n.**
See SETTLED LAND. 3, 4.
—— Mansion-house—Dilapidations—Repairs——Expenditure out of capital—Jurisdiction - - - - - **15**
See WILL. 7.
—— Reduction of capital—Scheme—Illegality—Nominal reduction—Actual increase—Issue of capital at a discount - **547**
See COMPANY. 8.

CASES—*Aston, In re,* (1883) 23 Ch. D. 217, applied - - - - **692**
See TRUSTEE. 4.
—— *Baker, Re,* (1898) 79 L. T. 343, approved **636**
See INHERITANCE.
—— *Barnhart* v. *Greenshields,* (1853) 9 Moo. P. C. 18, followed - - - - **428**
See VENDOR AND PURCHASER. 4.
—— *Beal's Estate, In re,* (1872) L. R. 13 Eq. 489, followed - - - - **889**
See DONATIO MORTIS CAUSÂ. 2.
—— *Birch* v. *Joy,* (1852) 3 H. L. C. 565, principle of, followed - - **901**
See RAILWAY. 1.
—— *Birmingham, Dudley and District Banking Co.* v. *Ross,* (1888) 38 Ch. D. 295, applied and followed - - **926**
See EASEMENT.
—— *British and American Trustee and Finance Corporation* v. *Couper,* [1894] A. C. 399, distinguished - - - **547**
See COMPANY. 8.
—— *Bromley* v. *Brunton,* (1868) L. R. 6 Eq. 275, observed upon - - - **889**
See DONATIO MORTIS CAUSÂ. 2.
—— *Burland* v. *Broxburn Oil Co.,* (1889) 42 Ch. D. 274 - - - - - **125**
See TRADE-MARK. 2.
—— *Caddick* v. *Highton,* [1901] 2 Ch. 476, n., overruled on one point - - **135**
See FRIENDLY SOCIETY.

CASES—*continued.*
—— *Caledonian Ry. Co.* v. *Carmichael,* (1870) L. R. 2 H. L., Sc. 56, distinguished **901**
See RAILWAY. 1.
—— *Cardigan (Countess of)* v. *Curzon-Howe,* (1893) 9 Times L. R. 244, followed **711**
See SETTLED LAND. 1.
—— *Caulfield* v. *Maguire,* (1845) 2 J. & La T. 141, referred to - - - **347**
See SETTLEMENT. 2.
—— *Church* v. *Brown,* (1808) 15 Ves. 258; 10 R. R. 74. Dictum of Lord Eldon in, followed - - - - **727**
See LANDLORD AND TENANT.
—— *Clarke* v. *Thornton,* (1887) 35 Ch. D. 307, distinguished - - - **711**
See SETTLED LAND. 1.
—— *Clément & Cie.'s Trade-Mark, In re,* [1900] 1 Ch. 114, approved of and distinguished **125**
See TRADE-MARK. 2.
—— *Collen* v. *Wright,* (1857) 8 E. & B., 647, 657, principle in, adopted and applied **610**
See PRINCIPAL AND AGENT. 1.
—— *Commissioners of Charitable Donations and Bequests* v. *Cotter,* (1841) 1 D. & War. 501, discussed - - - **214**
See CHARITY. 1.
—— *Cooper* v. *Martin,* (1867) L. R. 3 Ch. 47, dicta of Lord Cairns at p. 56 approved of - - - - - **100**
See POWER OF APPOINTMENT. 4.
—— *Courtenay* v. *Courtenay,* (1846) 3 J. & La T. 519, 533, followed - - - **692**
See TRUSTEE. 4.
—— *Coxen* v. *Rowland,* [1894] 1 Ch. 406, approved - - - - **314**
See POWER OF APPOINTMENT. 2.
—— *Crew* v. *Cummings,* (1888) 21 Q. B. D. 420, principle of, explained - - **396**
See COMPANY. 4.
—— *David and Matthews, In re,* [1899] 1 Ch. 378, applied - - - - **332**
See COMPANY. 1.
—— *Davies' Trusts, In re,* (1871) L. R. 13 Eq. 163, distinguished - - - **314**
See POWER OF APPOINTMENT. 2.
—— *Dawnay (Archibald D.), Ld.* [1900] W. N. 152, followed - - - **238**
See COMPANY. 13.
—— *De Lusi's Trusts, In re,* (1879) L. R. Ir. 232, distinguished - - - **314**
See POWER OF APPOINTMENT. 2.
—— *Derry* v. *Peek,* (1889) 14 App. Cas. 337, referred to - - - - **610**
See PRINCIPAL AND AGENT. 1.
—— *De Teissier's Settled Estates, In re,* [1893] 1 Ch. 153, 165, rule in, approved of and applied - - - - **15**
See WILL. 7.
—— *Dillon, In re,* (1890) 44 Ch. D. 76, observed upon - - - - - **889**
See DONATIO MORTIS CAUSÂ. 2.
—— *Dix* v. *Great Western Ry. Co.,* (1886) 34 W. R. 712, distinguished - **911**
See PRACTICE. 6.

CASES—*continued.*

—— *Dovey* v. *Cory*, [1901] A. C. 477, applied
See COMPANY. 6. 353

—— *Dowsett, In re*, [1901] 1 Ch. 398, approved of - - - - - 100
See POWER OF APPOINTMENT. 4.

—— *Edwards* v. *Dennis*, (1885) 30 Ch. D. 454, followed - - - - - 758
See TRADE-MARK. 1.

—— *Fairtlough* v. *Johnstone*, (1865) 16 Ir. Ch. Rep. 442, ratio decidendi of, explained and applied - - - - 203
See WILL. 3.

—— *Firbank's Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54, 60, rule in, adopted and applied - - - - - 610
See PRINCIPAL AND AGENT. 1.

—— *Fleetwood, In re*, (1880) 15 Ch. D. 594, followed - - - - - 214
See CHARITY. 1.

—— *Fox* v. *Fox*, (1875) L. R. 19 Eq. 286, distinguished - - - - - 945
See WILL. 10.

—— *Freer* v. *Hesse*, (1853) 4 D. M. & G. 495, followed - - - - - 599
See SETTLED LAND. 9.

—— *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511, referred to - 203, 347
See SETTLEMENT. 2.
WILL. 3.

—— *Furber, Ex parte*, [1893] 2 Q. B. 122, principle of, explained - - 396
See COMPANY. 4.

—— *German Date Coffee Co., In re*, (1882) 20 Ch. D. 169, followed - - 745
See COMPANY. 7.

—— *Hampshire Land Co., In re*, [1896] 2 Ch. 743 - - - - - - 507
See COMPANY. 14.

—— *Harte* v. *Meredith*, (1884) 13 L. R Ir. 341, followed - - - - - 218
See DISTRIBUTIONS, STATUTE OF.

—— *Haslam & Co.* v. *Hall*, (1887) 5 Rep. Pat. Cas. 1, 27 (see also Ibid. 144), not followed - - - - - 494
See PATENT.

—— *Haynes, In re*, (1887) 37 Ch. D. 306, followed - - - - - 378
See SETTLED LAND. 6.

—— *Herbert* v. *Webster*, (1880) 15 Ch. D. 610, followed - - - - - 543
See HUSBAND AND WIFE.

—— *Hewitt* v. *Kaye*, (1868) L. R. 6 Eq. 198, followed - - - - - 889
See DONATIO MORTIS CAUSÂ. 2.

—— *Hoskin's Trusts, In re*, (1877) 5 Ch. D. 229; 6 Ch. D. 281, applied - - 552
See POWER OF APPOINTMENT. 1.

—— *Hotchkys, In re*, (1886) 32 Ch. D. 408, ratio decidendi of, explained and applied 203
See WILL. 3.

—— —— —— —— —— —— —— referred to - - - - 347
See SETTLEMENT. 2.

CASES—*continued.*

—— *Jarvis (F. W.) & Co., Ld., In re*, [1899] 1 Ch. 193, followed - - - 238
See COMPANY. 13.

—— *Jennings* v. *Jennings*, [1898] 1 Ch. 378, applied - - - - 332
See COMPANY. 1.

—— *Joplin Brewery Co., In re*, [1902] 1 Ch. 79, referred to - - - - 695
See COMPANY. 2.

—— *Karberg's Case*, [1892] 3 Ch. 1, distinguished
See COMPANY. 11. 707

—— *Lee* v. *Neuchatel Asphalte Co.*, (1889) 41 Ch. D. 1, explained - - 353
See COMPANY. 6.

—— *London Corporation and Tubbs' Contract, In re*, [1894] 2 Ch. 524 - - 226
See VENDOR AND PURCHASER. 2.

—— *Low* v. *Bouverie*, [1891] 3 Ch. 82, discussed
See PRINCIPAL AND AGENT. 1. 610

—— *McCheane* v. *Gyles*, [1902] 1 Ch. 287, referred to - - - - - - 911
See PRACTICE. 6.

—— *M'Gonnell* v. *Murray*, (1869) Ir. R. 3 Eq. 460, distinguished on one point - 680
See DONATIO MORTIS CAUSÂ. 1.

—— *M'Ilwraith* v. *Green*, (1884) 14 Q. B. D. 766, applied - - - - 197
See COSTS.

—— *Mandleberg* v. *Morley*, (1895) 12 Rep. Pat. Cas. 35, followed - - - 494
See PATENT.

—— *Marsh* v. *Keating*, (1834) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75, discussed
See PRINCIPAL AND AGENT. 2. 816

—— *Michael's Trusts, In re*, (1877) 46 L. J. (Ch.) 651, not followed - - - 543
See HUSBAND AND WIFE.

—— *Middleton, In re*, (1882) 19 Ch. D. 552, followed - - - - 92
See PRACTICE. 2.

—— *Miner* v. *Gilmour*, (1858) 12 Moo. P. C. 131, at p. 156, followed - - 649
See WATER.

—— *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q. B. 321, distinguished - 911
See PRACTICE. 6.

—— *Moore* v. *North Western Bank*, [1891] 2 Ch. 599, followed - - - 522
See COMPANY. 12.

—— *Mumford* v. *Stohwasser*, (1874) L. R. 18 Eq. 556, dictum of Jessel M.R. at p. 562, disapproved - - - - 428
See VENDOR AND PURCHASER. 4.

—— *National Bank of Wales, In re*, [1899] 2 Ch. 629, reported on appeal as DOVEY *v.* CORY, [1901] A. C. 477, applied - 353
See COMPANY. 6.

—— *O'Brien* v. *Lewis*, (1863) 32 L. J. (Ch.) 569, distinguished - - - 765
See SOLICITOR. 1.

—— *Pedrotti's Will, Re*, (1859) 27 Beav. 583, distinguished - - - 76
See WILL. 1.

CASES—*continued.*

—— *Philbrick's Trusts, Re*, (1865) 13 W. R. 570, applied - - - - 552
See POWER OF APPOINTMENT. 1.

—— *Player & Sons' Trade-mark, In re*, [1901] 1 Ch. 382, distinguished - - 758
See TRADE-MARK. 1.

—— *Redman, In re*, [1901] 2 Ch. 471, overruled on one point - - - 135
See FRIENDLY SOCIETY.

—— *Revel* v. *Watkinson*, (1748) 1 Ves. Sen. 93, referred to - - - - 347
See SETTLEMENT. 2.

—— *Ridley, In re*, (1879) 11 Ch. D. 645, not followed - - - - 543
See HUSBAND AND WIFE.

—— *Saunders, In re*, [1898] 1 Ch. 17, 23, applicable - - - - - 457
See PRACTICE. 4.

—— *Smith* v. *Hancock*, [1894] 2 Ch. 377, applied
See RESTRAINT OF TRADE. 950

—— *Smokeless Powder Co.'s Trade-mark, In re*, [1892] 1 Ch. 590, approved of and distinguished - - - - 125
See TRADE-MARK. 2.

—— *Société Générale de Paris* v. *Walker*, (1885) 11 App. Cas. 20, followed - 522
See COMPANY. 12.

—— *Spencer's Trade-marks, In re*, (1886) 3 Rep. Pat. Cas. 73, followed - - 758
See TRADE-MARK. 1.

—— *Stamford's (Lord) Settled Estates, In re*, (1889) 43 Ch. D. 84, distinguished 711
See SETTLED LAND. 1.

—— *Sutcliffe* v. *Booth*, (1863) 32 L. J. (Q.B.) 136, followed - - - - 649
See WATER.

—— *Syer* v. *Gladstone*, (1885) 30 Ch. D. 614, ratio decidendi of, explained and applied. A supplementary note to this report
See WILL. 3. 203, 211, n.

—— *Talbot* v. *Earl Radnor*, (1834) 3 My. & K. 252; 41 R. R. 64, ratio decidendi of, explained and applied - - 203
See WILL. 3.

—— *Tollemache* v. *Coventry (Earl of)*, (1834) 2 Cl. & F. 611; 37 R. R. 260, applicable
See HEIRLOOMS. 807

—— *Tracy* v. *Hereford (Viscountess of)*, (1786) 2 Bro. C. C. 128, referred to - 347
See SETTLEMENT. 2.

—— *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, explained 353
See COMPANY. 6.

—— *Wandsworth Board of Works* v. *United Telephone Co.*, (1884) 13 Q. B. D. 904, distinguished - - - - 866
See LOCAL GOVERNMENT.

—— *Warren* v. *Brown*, [1902] 1 K. B. 15, referred to - - - - - 302
See LIGHT AND AIR.

—— *Warren's Trusts, In re*, (1884) 26 Ch. D. 208, distinguished - - - 436
See POWER OF APPOINTMENT. 3.

CASES—*continued.*

—— *Werderman* v. *Société Générale d'Electricité*, (1881) 19 Ch. D. 246, explained and distinguished - - - - 146
See CONTRACT.

—— *Whitehead & Brothers, In re*, [1900] 1 Ch. 804, distinguished - - - 238
See COMPANY. 13.

—— *Whitley* v. *Challis*, [1892] 1 Ch. 64, followed
See MORTGAGE. 2. 954

—— *Worms* v. *De Valdor*, 28 W. R. 346; 49 L. J. (Ch.) 261, followed - - - 488
See CONFLICT OF LAWS. 2.

—— *Young and Harston's Contract, In re*, (1885) 31 Ch. D. 168 - - - 226
See VENDOR AND PURCHASER. 2.

CERTIFICATE—As to validity of patent being in question - - - - 494
See PATENT.

CHARITY—Absolute gift—Secret trust—Trust for benefit of public, but so that they should acquire no rights - - 403
See WILL. 2.

1. —— *General or limited Charitable Purposes—Admissibility of Evidence—Residue—Will—Charitable Legacy.*

A testatrix by her will bequeathed 4000*l.* to A. "for the charitable purposes agreed upon between us":—

Held, that on the face of the will there was a gift, not for general, but for limited charitable purposes, and that evidence was admissible to shew what those purposes were.

In re Fleetwood, (1880) 15 Ch. D. 594, followed.

Held, also, on the evidence, that there was a good charitable bequest of the income of the fund during the life of A., and that on his death the corpus would fall into the residue of the estate.

Commissioners of Charitable Donations and Bequests v. *Cotter*, (1841) 1 D. & War. 501, discussed. *In re* HUXTABLE. HUXTABLE *v.* CRAWFURD - - - - **Farwell J. 214**

2. —— *Gift to Charity—Devise of Land on Trust for Sale—"Personal Estate arising from Land"—Right of Trustees to retain Land unsold—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.

Land was devised to trustees on trust to sell and to hold the proceeds, after making certain payments thereout, upon trust for a charity. The will contained a power to the trustees to postpone sale:—

Held, that the subject-matter of the gift, being "personal estate arising from land," was within the exception from the definition of "land" contained in s. 3 of the Mortmain and Charitable Uses Act, 1891, and that therefore s. 5 of the Act was not applicable, and it was competent for the trustees, without obtaining the leave of the Court, to retain the land unsold after the expiration of one year from the death of the testator. *In re* WILKINSON. ESAM *v.* ATTORNEY-GENERAL - - - **Kekewich J. 841**

CHARITY—*continued.*

3. —— *Inn of Chancery—School of Learning—Study of the Law—Failure of Object—Disposition of Property—Charitable Purpose.*

The Society of Clifford's Inn was one of the Inns of Chancery which were established to provide for the legal education of students of the law. In the year 1618 by an indenture of feoffment the messuage and premises occupied by the society were assured to certain members thereof as trustees, in consideration of the payment of a sum of money, and the reservation of certain rents. The indenture declared that the intention of the grantors was that the messuage commonly called Clifford's Inn, which was stated to have been for many years used and employed as an Inn of Chancery for the study and practice of the common laws of the realm, and to have been governed to the good of the Commonwealth and the honour of the grantors and their ancestors, "shall and may hereafter continue to be employed as an Inn of Chancery for the furtherance of the practisers and students of the Common Law of the Realm as aforesaid," and that the society should from thenceforth be assured of a certain estate therein, and the operative part of the deed declared that the true intent and meaning thereof and of the parties thereto was that "Clifford's Inn shall for ever hereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of the society and for the benefit of the Commonwealth as aforesaid and not otherwise." The property had long been dealt with by the society as its own, and for its own purposes, and the surviving members contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, to be divided and disposed of as they might think fit:—

Held, that the property vested in the present trustees was held by them upon trust for charitable purposes.

Judgment of Cozens-Hardy J., [1900] 2 Ch. 511, affirmed. SMITH *v.* KEBR - **C. A. 774**

4. —— *Non-existence of Institution named—Lapse—Cy-près—Meaning of "Charitable Institution"—Will—Legacy.*

The testatrix by her will gave pecuniary legacies to charities established for a variety of purposes, e.g., to aid consumptive persons, blind persons, orphans, deaf and dumb persons, epileptics and paralytics. One of the legacies was of a sum of 500*l.* to "the Home for the Homeless, 27, Red Lion Square, London."

After providing that in the event of any question arising as to the designation of any of the charitable institutions, or of any doubt arising as to which one of two or more of them it was intended to benefit, the decision should rest absolutely with her executor, and after giving other legacies, the testatrix provided that her residuary moneys should be "divided rateably among the various charitable institutions which are beneficiaries under this instrument."

At the date of the will there was not, and there never had previously been, in London any charitable institution known as the "Home for the Homeless." After making provision for debts and legacies there was a fund distributable as residue among the charitable institutions which were beneficiaries under the will:—

Held, (1) that the Court was justified in drawing the inference of a general charitable intention with reference to the gift of 500*l.*, and that the gift did not lapse, but must be administered cy-près; (2) that the word "institutions" was large enough to include any authority or person that would have to administer the fund, and that that authority or person was also entitled to the share of residue which would have been taken by the "Home for the Homeless" if it had existed.

In re DAVIS. HANNEN *v.* HILLYER

Buckley J. 876

CHEQUE—Gift of cheque drawn by deceased—Non-payment in his lifetime—Overdrawn account - - - **889**
See DONATIO MORTIS CAUSÂ. 2.

CHILDREN.
See under INFANT.

CLASS—Severance of—Married Woman—Restraint on anticipation—Rule against perpetuities - - - - **543**
See HUSBAND AND WIFE.

CLOG ON REDEMPTION—Agreement subsequent to mortgage—Option to purchase—Conditional sale - - - - **53**
See MORTGAGE. 1.

COMMISSION—Surcharge—Taxation—Disclosure—Duty to advise—Bargain with client - - - - **765**
See SOLICITOR. 1.

COMPANY—*Debenture—Goodwill—"Property"—Jurisdiction to appoint Manager—Debenture-holder's Action.*

Debentures issued by a hotel company charged all the company's "lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future":—

Held, that the word "property" was sufficient to include the goodwill or business of the company, and that therefore, in a debenture-holder's action, the Court had jurisdiction to appoint a manager.

Jennings v. *Jennings*, [1898] 1 Ch. 378, and *In re David and Matthews*, [1899] 1 Ch. 378, applied. *In re* LEAS HOTEL COMPANY. SALTER *v.* LEAS HOTEL COMPANY - **Kekewich J. 332**

2. —— *Debentures—Registration—Extending Time—Application after Commencement of Winding-up.*

The directors of a company in 1898 resolved to raise 5500*l.* on debentures of 100*l.* each charging the company's assets, including its uncalled capital, and ranking pari passu. Before January 1, 1901 (the date of commencement of the Companies Act, 1900), fifty of the debentures were issued. The remaining five debentures were issued to D. in July, 1901. D. never registered his debentures, having been advised by his solicitor (who had considered the provisions of the Act of 1900) that registration was unnecessary. In October, 1901, the company passed an extraordinary resolution for voluntary winding-up, and subsequently D. applied, under s. 15 of the Act, for an order extending the time for registration

COMPANY—*continued.*

of his debentures. The assets were valued at 5030*l.*, without providing for costs:—

Held, that, although the omission to register was not "accidental" or "due to inadvertence" within the meaning of s. 15, it was due "to some other sufficient cause"; but that it would be unjust to the other creditors to grant the extension of time without qualifying the order as in *In re Joplin Brewery Co.*, [1902] 1 Ch. 79, and that to make an order in that form in a case where the winding-up of the company had commenced could not benefit any one.

The application was accordingly dismissed. *In re* S. ABRAHAMS & SONS - **Buckley J. 695**

3. —— *Debentures — Registration — Extension of Time — Protection of Creditors—Practice—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

An order under s. 15 of the Companies Act, 1900, extending the time for registration of debentures ought to contain the words: "but that this order be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." *In re* JOPLIN BREWERY COMPANY - **Buckley J. 79**

4. —— *Debentures—Registration — Extension of Time—Protection of Creditors—Winding-up—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

Debentures containing a floating charge on the assets and undertaking of a company were not registered as required by s. 14 of the Companies Act, 1900, the omission to register being due to inadvertence. After the commencement of the winding-up of the company, the debentureholders applied, under s. 15 of the Act, for an order extending the time for registration:—

Held, that the order must state that it was "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

The principle of *Crew* v. *Cummings*, (1888) 21 Q. B. D. 420, and *Ex parte Furber*, [1893] 2 Q. B. 122 (as to extending the time for registration of a bill of sale), is not limited in its application to cases in which the ownership of or property in goods has actually changed; it extends to cases in which the rights of third parties have actually accrued and would be prejudicially affected if registration were allowed without saving those rights. *In re* SPIRAL GLOBE, LIMITED **Swinfen Eady J. 396**

5. —— *Directors—Remuneration under Articles of Association—Appointment by Court of some of Directors as remunerated Receivers and Managers — Right to receive Remuneration in both Capacities.*

The directors of a company were entitled under its articles of association to be paid at the rate of a certain sum a year to be divided amongst them as they should agree amongst themselves. In pursuance of their agreement the remuneration was paid to the directors in certain proportions. In a debenture-holders' action against the company two of the directors were appointed by the Court to be receivers and managers of the company's assets and business, and the Court allowed them a remuneration for so acting. Subsequently the company went into voluntary winding-up:—

Held, that the fact of the two directors being remunerated as receivers and managers did not disentitle them to their remuneration in addition as directors from the time when they were appointed receivers and managers until the commencement of the winding-up. *In re* SOUTH WESTERN OF VENEZUELA (BARQUISIMETO) RAILWAY COMPANY - - - **Buckley J. 701**

6. —— *Dividends—Loss of Capital — Profits available for Distribution—Expert Evidence — Preference Shares—Fixed Cumulative Dividend—Declaration — Directors' Discretion — Interest — Dividend—Profit — Fixed Capital — Circulating Capital—Realized Loss—Estimated Loss.*

The question whether a company has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses.

In re National Bank of Wales, [1899] 2 Ch. 629, reported on appeal as *Dovey* v. *Cory*, [1901] A. C. 477, applied.

Although in some cases fixed capital may be sunk and lost, without precluding the payment of a dividend, circulating capital must be kept up, and (*semble*) there is no distinction in this respect between a realized loss and an estimated loss.

Lee v. *Neuchatel Asphalte Co*, (1889) 41 Ch. D. 1, and *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, explained.

The distinction between the propositions "Dividends must not be paid out of capital" and "Dividends may only be paid out of profits" explained.

The common article requiring dividends to be declared by the directors applies to fixed cumulative dividends on preference shares, and the Court will not readily override the directors' discretion in relation thereto.

The meaning of the words "interest," "dividend," "profit," "fixed capital," and "circulating capital" discussed.

Leasehold iron ore mines held by a smelting company for the purpose of supplying themselves with ore are circulating capital. BOND *v.* BARROW HÆMATITE STEEL COMPANY - **Farwell J. 353**

7. —— *Memorandum of Association—Construction — Objects — Ancillary Powers — Declaration at all Clauses independent — Ultra Vires — Injunction.*

Notwithstanding a declaration, contained in the objects clause of a memorandum of association, "that the objects specified in each paragraph of this clause shall be in nowise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company," wide powers given in general words will be construed as ancillary only to a specific object mentioned in the first paragraph.

In re German Date Coffee Co., (1882) 20 Ch. D. 169, followed. STEPHENS *v.* MYSORE REEFS (KANGUNDY) MINING COMPANY **Swinfen Eady J. 745**

8. —— *Reduction of Capital—Scheme—Illegality—Nominal Reduction—Actual Increase—Issue of Capital at a Discount.*

A company passed a resolution to reduce its

COMPANY—*continued.*

capital by cancelling a class of 1*l.* deferred shares in the nature of founders' shares upon the terms of an agreement that the deferred shareholders should consent to the cancellation, and, as soon as the reduction was confirmed, the capital should be increased, and each deferred shareholder should receive 100 1*l.* ordinary shares, part thereof, in exchange for each 1*l.* deferred share. The agreement was conditional on the company obtaining an order confirming the reduction.

The petition for the confirmatory order was supported by all the shareholders. There were practically no creditors, the only debts being a small sum for current expenses :—

Held, that as the reduction scheme in its entirety really involved an increase of capital, and an issue of part thereof at 99 per cent. discount without any consideration to the company, it was wholly illegal, and the reduction could not be confirmed.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A. C. 399, distinguished. *In re* DEVELOPMENT COMPANY OF CENTRAL AND WEST AFRICA **Swinfen Eady J. 547**

9. —— *Shares—Agreement to Vote in a particular Way—Executors—Directors.*

Executors holding shares in a company agreed to sell part of them to G., who stipulated that as part of the transaction he should nominate X. and W. as directors, and that the executors should, when either X. or W. should retire by rotation, vote for and not against his re-election. The agreement extended to shares whether held by the executors in that capacity or in their own personal capacity. W. was about to retire by rotation, and some of the executors threatened to oppose his re-election :—

Held, that the agreement was valid as regarded shares held by the executors either as such or as directors, and that on W. undertaking to retire, if required by the Court, at the ordinary meeting next after the trial, an injunction must be granted until the trial restraining such of the executors as threatened to do so from voting against the re-election of W. on his retirement by rotation. GREENWELL *v.* PORTER - **Swinfen Eady J. 530**

10. —— *Shares — Bankruptcy of Member — Claim to Lien under Articles for Bankrupt's Liabilities to Company—Trustee's Right to Registration and Share Certificate not referring to Claim—Rectification of Register—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 25, 30, 35; *Sched. I., Table A, clauses* 2, 13.

Where a shareholder of a company becomes bankrupt and the transmission clause in its articles of association is in the form of clause 13 of Table A in the 1st schedule to the Companies Act, 1862, the trustee is entitled to be registered in respect of and to have a certificate of the shares, and the company has no right to enter in the register of members or in his certificate any statement as to the company's claim under its articles to a lien on the shares for the liabilities of the bankrupt to the company.

The right of the trustee to clean registration may be enforced by motion for rectification of the register under s. 35 of the Act of 1862. *In re* W. KEY & SON, LIMITED - - **Byrne J. 467**

COMPANY—*continued.*

11. —— *Shares—Memorandum of Association—Subscription obtained by Misrepresentation—Winding-up—Contributory—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18, 23.

L. signed the memorandum of association of a company before its incorporation for 250 shares. After its incorporation he sought to escape from liability on the shares on the ground that he was induced to sign the memorandum by the misrepresentation of a promoter of the company :—

Held, that, assuming the misrepresentation was made and acted on, L. was nevertheless liable on the shares, (*a*) because the company before it came into existence could not appoint an agent, and was therefore not liable for the acts of the promoter; (*b*) that by signing the memorandum L. on the registration of the company became bound, not only as between himself and the company, but also as between himself and the other persons who should become members.

Karberg's Case, [1892] 3 Ch. 1, distinguished. *In re* METAL CONSTITUENTS, LIMITED. LORD LURGAN'S CASE - - - **Buckley J. 707**

12. —— *Shares — Transfer — Registration — Transfer in blank—Equitable Mortgage of Shares —Notice—Priority.*

On March 4, 1901, I. executed to the defendant H. as security for a loan a transfer in blank of certain shares in a company, which were registered in his name, but which he held as trustee for his wife, the plaintiff. H. had no notice of the plaintiff's title to the shares. On November 23, 1901, H., having filled up the blank transfer in his own name, left it, together with the certificate, at the company's office for registration. On November 26 the managing director of the company had an interview with I. with reference to the transfer, the amount of the consideration, as filled in, not appearing to be the full value of the shares, and I. informed him that H. was not entitled to have the shares registered in his name, and requested the company to delay registration. On November 27 the directors held a meeting at which the managing director stated what had occurred between I. and himself. The transfer was not formally before the meeting, no resolution was passed with reference to it, and it was not registered. On the same day the plaintiff brought an action against H. and I. and the company, claiming the shares, and obtained an interim injunction restraining the transfer. The company were not served with the writ until after the meeting of the 27th, and they had had no previous notice of the plaintiff's title.

Upon the trial of the action :—

Held, on the authority of *Société Générale de Paris* v. *Walker*, (1885) 11 App. Cas. 20, and *Moore* v. *North Western Bank*, [1891] 2 Ch. 599, that on November 27 H. had not a present absolute unconditional right to registration, and, consequently, that he had not acquired a legal title to the shares, and the plaintiff's prior equitable title must prevail. IRELAND *v.* HART **Joyce J. 522**

13. —— *Shares paid for otherwise than in*

COMPANY—*continued.*

Cash—Omission to file Contract—Signatory to Memorandum—Subsequent Agreement—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

Seven persons signed the memorandum of association of a company, formed for carrying on a business, for specified numbers of shares amounting in the aggregate to 750 shares. On March 3, 1893, the company was incorporated. The total capital consisted of 1000 shares, of which 750 were mentioned in the memorandum, and 118 had been issued and paid for in cash, leaving a balance of 132 shares. The memorandum and articles referred to an agreement between the signatories and the company for the sale of the business to the company, and this agreement was executed on March 4, 1893. It referred to the 750 shares, and stated that they were to be fully paid shares. On March 22 it was filed under the Companies Acts, and on April 15 the 750 shares were allotted to the signatories. The signatories were advised that they were liable to pay for the 750 shares in cash, and applied to the Court for liberty to file a memorandum stating that the shares were issued to them as part of the consideration for the assignment of the business:—

Held, that the 750 shares must be taken to have been issued at the date of the registration of the company; that the fact that the shares were identified, in the sense that the parties intended the shares referred to in the agreement and allotted to the subscribers to be the same as those for which they signed the memorandum, was not sufficient to enable the Court to allow a memorandum to be filed; there was no company in existence at the date of their signature, so there could not then be a contract to pay for these shares otherwise than in cash, and there could not be a subsequent contract for that purpose.

In re F. W. Jarvis & Co., Limited, [1899] 1 Ch. 193, and *In re Archibald D. Dawnay, Limited*, [1900] W. N. 152, followed.

In re Whitehead & Brothers, [1900] 1 Ch. 804, distinguished, on the ground that in that case all the shares in the company had been taken by the signatories. *In re* EBENEZER TIMMINS & SONS, LIMITED - - - - **Buckley J. 238**

14. —— *Winding-up—Bill of Exchange—Dishonour—Notice—Person acting as Secretary of two Companies—Knowledge in one Character—Presumption of Notice in other Character—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 48, 49, 50, *sub-s.* 2 (*b*).

Where a man acts as secretary of two companies, it is not true as a general proposition that a fact which comes to his knowledge as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship. In order to make it notice, it must be shewn that it was his duty to the first company to communicate his knowledge to the second company. *In re* FENWICK, STOBART & CO. DEEP SEA FISHERY COMPANY'S CLAIM **Buckley J. 507**

—— Electric lighting company.
See under ELECTRIC LIGHT.

COMPANY—*continued.*

—— Mortgage — Shares in company—Implied power of sale—Notice to mortgagor **579**
See MORTGAGE. 4.

—— Originating summons—Articles of association—Questions affecting class of shareholders - - - - **898**
See PRACTICE. 5.

—— Privity of contract—Contract with promoter for benefit of intended company - **146**
See CONTRACT.

—— Railway company — Tolls — Undue preference—Ultra vires - - **369**
See RAILWAY. 2.

COMPENSATION—Interest—Mine-owner stopped from working mines within prescribed distance - - - - **901**
See RAILWAY. 1.

COMPROMISE—Sale of tenant for life's interest—Investment - - - **378**
See SETTLED LAND. 6.

CONDITION—Tenant for life—Forfeiture clause—Non-residence—Validity of condition **378**
See SETTLED LAND. 6.

CONDITIONAL SALE—Clog on redemption—Agreement subsequent to mortgage—Conditional sale - - - **53**
See MORTGAGE. 1.

CONDITIONS OF SALE — Delay — Interest — Damages—Loss of expected profits **191**
See VENDOR AND PURCHASER. 1.

—— Interest on purchase-money—Wilful default **226**
See VENDOR AND PURCHASER. 2.

CONFLICT OF LAWS—*Domiciled Foreigner—Unattested Will—Immovables—Leaseholds—Administration with Will annexed—Lex rei Sitæ—Lex Domicilii—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 9.

The beneficial interest in leasehold property in England will not pass under the will of a domiciled foreigner executed according to the law of his domicil but not attested as required by the Wills Act, 1837, notwithstanding that letters of administration with the will annexed have been granted by the Probate Division.

Decision of Kekewich J., [1900] 2 Ch. 504, affirmed. PEPIN *v.* BRUYÈRE - - **C. A. 24**

2. —— *French Law—Fund in Court—French Subject entitled—"Prodigal"—Status—Capacity to sue—"Conseil Judiciaire"—Code Civil*, § 513—*Payment out.*

By the Code Napoléon a French subject of full age, who is of extravagant habits, when adjudged by a French Court of competent jurisdiction to be a "prodigal," is restrained from dealing with, disposing of, alienating, receiving or giving a receipt for his movable property, without the consent of a "conseil judiciaire" (legal adviser). But, although this judgment modifies and affects the status of the "prodigal," it is a disqualification unknown to English law, and will be disregarded by English Courts.

Where, therefore, a French subject of full age, who had been adjudged a "prodigal," and placed under the control of a "conseil judiciaire"

CONFLICT OF LAWS—*continued.*
by the judgment of a French Court of competent jurisdiction, became entitled to a fund in court in England:—
Held, that he was entitled to payment out of the fund to himself on his sole receipt, notwithstanding the opposition of his "conseil judiciaire."
Worms v. *De Valdor*, (1880) 28 W. R. 346; 49 L. J. (Ch.) 261, discussed and followed. *In re* SELOT'S TRUST - - - Farwell J. 488

3. —— *Marriage—Capacity—Italian Subjects—Italian Domicil—Italian Marriage—Deceased Husband's Brother—Lord Lyndhurst's Act (Marriage Act)*, 1835 (5 & 6 *Will.* 4, *c.* 54), *s.* 2.
A naturalised Italian domiciled in Italy married her deceased husband's brother, an Italian domiciled in Italy. The marriage, which was solemnised in Italy, after the necessary dispensations had been obtained, was admittedly valid in Italy:—
Held, that, notwithstanding Lord Lyndhurst's Act, the marriage was valid in England.
Semble, the law of the common domicil is sufficient to determine marriage capacity, except in the case of marriages stamped as incestuous by the general consent of Christendom. *In re* BOZZELLI'S SETTLEMENT. HUSEY-HUNT *v.* BOZZELLI - - - Swinfen Eady J. 751

—— "Mobilia sequuntur personam"—English fund belonging to Austrian who died without heirs—Right of succession 847
See BONA VACANTIA.

CONSOLIDATION—Agreement to execute legal mortgage as the mortgagee may require 954
See MORTGAGE. 2.

CONSTRUCTIVE NOTICE — Adverse title — Notice by tenancy - - - 428
See VENDOR AND PURCHASER. 4.

CONTINGENT LIFE INTEREST—Maintenance—Accumulations, Right to - 918
See INFANT. 1.

CONTINGENT OR VESTED—Residue to individuals in shares, Gift of—Income for maintenance of all, Gift of - 945
See WILL. 10.

CONTRACT—*Privity of Contract—Contract with Promoter for Benefit of intended Company—Ratification—Adoption—Agreement to grant to Promoter and that he or intended Company should accept Licence to use Patent—Right of Grantee to enforce Agreement against Company when formed.*
On March 3, 1897, the plaintiffs agreed to grant to Phelps, and he agreed that he or a company then being formed by him should accept an exclusive licence to use some patents belonging to the plaintiffs. The consideration for the grant was to be that (after providing for payment to the shareholders of the company in each year a cumulative preference dividend of 8 per cent. on a capital of 150,000*l.*, and setting aside such sum as the directors should think fit as a reserve fund) the company should pay to the plaintiffs in each year out of their remaining profits available for dividend 8 per cent. upon a fixed capital of 150,000*l.*, and that after payment

CONTRACT—*continued.*
of these sums the plaintiffs should be entitled to receive one-half of the balance (if any) of net profits of the company available for dividend in each year.
On March 4, 1897, the plaintiffs granted the exclusive licence to Phelps. The licence contained a recital of the agreement of March 3, and was expressed to be made in consideration of that agreement and of the payment therein agreed to be made by the licensee to the plaintiffs.
By an agreement dated March 5, 1897, between Phelps (as vendor) and one Piercy, for and on behalf of the intended company, after a recital of the agreement of March 3 and the licence of March 4, it was agreed that Phelps should sell and the company should purchase the full benefit of the licence and the agreement of March 3 for the consideration therein mentioned.
The intended company was registered on March 8, 1897.
By an agreement dated April 8, 1897, between Phelps, Piercy, and the company, it was provided that the agreement of March 5 should be adopted by the company and should be binding on Phelps and the company in the same manner as if the company had been in existence at the date thereof, and had by the agreement of April 8 ratified the same.
The company made some use of the licence, though it was never actually assigned to them by Phelps.
The plaintiffs brought an action against the company to enforce the performance by them of the provisions of the agreement of March 3:—
Held, that assuming that the plaintiffs were entitled to sue the defendants upon that agreement, yet upon its true construction nothing had become due to the plaintiffs which had not been paid to them, and consequently that no cause of action had arisen:
Held, also, that there was no privity of contract between the plaintiffs and the defendants, and therefore no legal right of action by the former against the latter.
And, *per* Vaughan Williams L.J.: The plaintiffs had not, by reason of their having taken the benefit of the agreement of March 3 and the licence, any equitable right to sue the defendants.
Per Romer L.J.: *Semble*, that in case any money should thereafter become due to the company under the agreement of March 3, the plaintiffs might possibly have some remedy by obtaining leave to use the name of Phelps in proceedings against the company or otherwise.
Decision of Kekewich J., [1901] 1 Ch. 196, affirmed.
Werderman v. *Société Générale d'Electricité*, (1851) 19 Ch. D. 246, explained and distinguished. BAGOT PNEUMATIC TYRE COMPANY *v.* CLIPPER PNEUMATIC TYRE COMPANY - - C. A. 146

—— Omission to file contract—Shares paid for otherwise than in cash - - 238
See COMPANY. 13.

—— Purchase of land—Lien for deposit—Power to purchaser to rescind in given event
See VENDOR AND PURCHASER. 3. 835

CONTRIBUTION—Action against one trustee only—Application to join co-trustee for purpose of contribution - - 911
See PRACTICE. 6.

—— Service out of jurisdiction—Third-party notice - - - - 287
See PRACTICE. 7.

CONTRIBUTORY — Shares — Subscription obtained by misrepresentation - 707
See COMPANY. 11.

CONVEYANCING AND LAW OF PROPERTY ACT—Adverse title—Constructive notice—Notice by tenancy - - 428
See VENDOR AND PURCHASER. 4.

—— Infant — Accumulations, Right to — Contingent life interest - - 918
See INFANT. 1.

—— Infant tenant for life—Possession during minority—Guardian—Trustee - 391
See SETTLED LAND. 8.

—— Light—Derogation from grant—Implication - - - - - 926
See EASEMENT.

—— Mortgages—Consolidation—Redemption
See MORTGAGE. 2. 954

—— Notice to mortgagor—Shares in company—Implied power of sale - - 579
See MORTGAGE. 4.

—— Public-house—Disputed title—Receiver of licences and of rents and profits - 386
See RECEIVER.

CO-PARCENARY—Joint tenancy or—Devise to testator's "right heirs"—Co-heiresses
See INHERITANCE. 636

COPYRIGHT—*Book—Author and Publisher—Encyclopædia—Ownership of Copyright in Contributions—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 18.

The plaintiff A. was employed by the defendants, a firm of publishers, to edit an encyclopædia on sport, and it was a term of the agreement that he was to be remunerated for his editorial services by a lump sum for which he was to contribute certain articles without further fee. The plaintiff C. was also employed by the defendants to contribute certain articles to the encyclopædia at so much per thousand words :—

Held, that there were no special circumstances either in the nature of the publication or in the terms of the employment to warrant the inference that the copyright in the articles contributed by the plaintiffs was to belong to the publishers, and an injunction was granted to restrain the defendants from publishing those articles in a separate form. AFLALO *v.* LAWRENCE & BULLEN, LIMITED
Joyce J. 264

2. —— *Infringement*—"*Print or cause to be printed*"—*Agent—Estoppel—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 15.

The defendant Gavin published a book which contained passages copied from a book of the plaintiffs, and thus infringed their copyright. A contract had been entered into between Gavin and the defendants Lloyds that they should print his book, receiving payment from him for so doing. After they had printed some of the

COPYRIGHT—*continued.*

sheets (including the title-page) they found that they could not complete the printing of the remaining sheets by the date fixed for the publication of the book, and at Gavin's request they relinquished their contract, so that he might have the remaining sheets printed elsewhere. He accordingly contracted with other printers to print the remaining sheets. When the book was published it bore on the title-page the statement "Printed at Lloyds." The piracy occurred in those sheets which were not printed by Lloyds, and they were ignorant of the piracy until they were informed of it after the publication. The Court were satisfied by the evidence that Gavin and Lloyds were not partners or co-adventurers in the publication of the book, and that the printers who printed the pirated matter were agents of Gavin and not of Lloyds :—

Held, that Lloyds had not printed the pirated matter, and that they had not "caused" it to be printed within the meaning of s. 15 of the Copyright Act, 1842, and that consequently they were not liable under that section.

Decision of Byrne J., [1901] 1 Ch. 374, affirmed. KELLY'S DIRECTORIES, LIMITED *v.* GAVIN AND LLOYDS - - - C. A. 631

COSTS — *Public Authority — Action against — Several Issues — Payment into Court as to one Issue — Denial of Liability — Action "proceeded with" — Acceptance of Payment — Discontinuance — Apportionment — Solicitor and Client Costs — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*c*)—*Rules of Supreme Court*, 1883, *Order* XXII., *rr.* 6, 7; *Order* XXVI., *r.* 1.

Plaintiff sued a public authority for damages on several issues. Defendants paid money into court in respect of one issue, with a denial of liability. Plaintiff "proceeded with" the action, but ultimately accepted the sum paid into Court in satisfaction of all the issues :—

Held—

(1) Defendants must pay plaintiff her costs of the issue in respect of which the money was paid in, up to the date of that payment, and plaintiff must pay defendants their costs of the discontinued issues up to that date, and all their subsequent costs.

M'Ilwraith v. *Green*, (1884) 14 Q. B. D. 766, applied.

(2) Defendants were not entitled to solicitor and client costs from the date of the payment in, as s. 1 (*c*) of the Public Authorities Protection Act, 1893, is confined to cases in which the action is "proceeded with" to judgment, and does not apply to a discontinuance under Order XXVI., r. 1, where money is paid into court under Order XXII. with denial of liability and not in satisfaction. SMITH *v.* NORTHLEACH RURAL DISTRICT COUNCIL - Farwell J. 197

—— Administration — Originating summons — Costs out of estate—Costs "as between solicitor and client" - - 436
See POWER OF APPOINTMENT. 3.

—— Administration — Successive appointments of specific sums—Appointment of residue
See PRACTICE. 4. 457

COSTS—*continued.*

—— Administration action—Real and personal estate—Apportionment—Land Transfer Act - - - - - 92
See PRACTICE. 2.

—— Appeal — Order whether final or interlocutory — Solicitor — Summons for taxation - - - - 29
See PRACTICE. 1.

—— Commission — Surcharge — Taxation—Disclosure—Duty to advise—Bargain with client - - - - 765
See SOLICITOR. 1.

—— Mortgagee's costs — Redemption—Costs of negotiating loan and preparing mortgage deed - - - - 860
See MORTGAGE. 3.

—— Taxation—Solicitor mortgagee — Negotiation fee - - - - 741
See SOLICITOR. 2.

—— Warrant to sheriff—Sheriff's costs—"Deduction" from purchase-money — Lands Clauses Act - - - 326
See PRACTICE. 3.

COVENANT—After-acquired property—"During the marriage"—Judicial separation 82
See SETTLEMENT. 1.

—— Against assignment—Demise of exclusive right of fishing — Grant by lessee of limited licence to fish - - 727
See LANDLORD AND TENANT.

—— Breach of covenant — Public-house — Licences in jeopardy — Recovery of possession—Disputed title - 386
See RECEIVER.

—— "Interested" in similar business—Servant—Fixed salary - - - 950
See RESTRAINT OF TRADE.

—— Validity—Covenant as to mode of execution of special testamentary paper 436
See POWER OF APPOINTMENT. 3.

CREDITORS — Protection of — Debentures — — Registration — Extension of time—Winding-up - - - - 396
See COMPANY. 4.

—— Trustee carrying on testator's business—Defaulting trustee—Indemnity - 342
See TRUSTEE. 1.

CY-PRÈS—"Charitable institution," Meaning of —Non-existence of institution named—Lapse - - - - 876
See CHARITY. 4.

DAMAGE — Ancient lights — Prescription — "Substantial" interference — Angle of 45 degrees - - - - 302
See LIGHT AND AIR.

DAMAGES—Conditions of sale—Delay—Interest—Loss of expected profits - 191
See VENDOR AND PURCHASER. 1.

DEED—*Alteration—Name of Party—Misdescription—Mortgage—Reconveyance—Married Woman—Trustee Mortgagee—Concurrence of Husband—Separate Acknowledgment.*

Upon a sale of freehold property the abstract of title delivered to the purchaser commenced with a mortgage to three persons, of whom the third was described as "William" G. It appeared from the original deed that the name "William" had been erased, and the names "Edward Thomas" substituted. The alteration was made after execution, but it was not known when or by whom. It was proved that the person described as William G. was really Edward Thomas G., and that the misdescription was due to inadvertence:—

Held, that the alteration was immaterial, and, in the absence of fraud, did not avoid the deed.

The mortgage was dated in 1878 and was granted to trustees; and in 1896, upon payment of the mortgage debt, the property was reconveyed by the sole surviving trustee, who was a married woman:—

Held, that under s. 16 of the Trustee Act, 1893, she was competent to reconvey without the concurrence of her husband and a separate acknowledgment. *In re* HOWGATE AND OSBORN'S CONTRACT - - - - **Kekewich J.** 451

DEATH—Legatee entitled to share on surviving testator—Disappearance—No evidence of death—Presumption - - 723
See WILL. 6.

—— Surety—Bond to secure fidelity of employee—Determination of liability - 733
See PRINCIPAL AND SURETY.

DEBENTURE — Goodwill — "Property"—Jurisdiction to appoint manager - 332
See COMPANY. 1.

—— Registration—Extending time—Application after commencement of winding-up 695
See COMPANY. 2.

—— Registration—Extension of Time—Protection of creditors - - - - 79
See COMPANY. 3.

—— Registration — Extension of time—Protection of creditors—Winding-up - 396
See COMPANY. 4.

DELAY—Conditions of sale—Interest—Damages—Loss of expected profits - 191
See VENDOR AND PURCHASER. 1.

DELIVERY—Evidence—Building society share certificates—Post Office Savings Bank deposit-book - - - 680
See DONATIO MORTIS CAUSÂ. 1.

DEPOSIT—Lien for—Power to purchaser to rescind in given event - - 835
See VENDOR AND PURCHASER. 3.

DEROGATION FROM GRANT—Implication — Light—Building agreement—Plan 926
See EASEMENT.

DESCENT—Root of—"Purchaser" — Devise to testator's "right heirs"—Co-heiresses 636
See INHERITANCE.

DIGNITY—Heirlooms—Bequest to descend with dignity—Period of absolute vesting 807
See HEIRLOOMS.

DILAPIDATIONS — Mansion-house — Salvage — Repairs—Expenditure out of capital—Jurisdiction - - - - 15
See WILL. 7.

DIRECTORS—Appointment by Court of some of directors as remunerated receivers and managers—Remuneration - 701
See COMPANY. 5.

—— Dividends—Profits available for distribution—Directors' discretion - 353
See COMPANY. 6.

—— Shares—Agreement to vote in a particular way—Executors - - - 530
See COMPANY. 9.

DISCHARGE—Trustee—No new trustee appointed—Administration action—Jurisdiction
See TRUSTEE. 4. 692

DISCLAIMER—Subsequent to application for registration - - - - 125
See TRADE-MARK. 2.

DISCLOSURE—Commission—Surcharge — Taxation—Duty to advise—Bargain with client - - - - 765
See SOLICITOR. 1.

DISCONTINUANCE—Public authorities protection—Solicitor and client costs - 197
See COSTS.

DISCOUNT—Reduction of capital — Scheme — Illegality—Nominal reduction—Actual increase—Issue of capital at a discount
See COMPANY. 8. 547

DISTRIBUTIONS, STATUTE OF — *Intestacy — Administration—Death of Universal Legatee and Sole Executrix before Testator—Advancements to Children—Hotchpot—Statute of Distributions*, 1671 (22 & 23 *Car.* 2, *c.* 10), *s.* 5.

The provisions of s. 5 of the Statute of Distributions, directing advancements by the intestate in his lifetime by portions to his children to be brought into account, apply to an intestacy occasioned by a testamentary instrument becoming wholly inoperative by the death of the universal legatee and executrix in the lifetime of the testator, as well as to a case of actual intestacy occasioned by the non-existence of any testamentary instrument.

Harte v. *Meredith*, (1884) 13 L. R. Ir. 341, followed. *In re* FORD. FORD *v.* FORD
Buckley J. 218

DIVIDENDS—Profits available for distribution—Expert evidence - - - 353
See COMPANY. 6.

DOMICIL — Lunacy — Jurisdiction — Inquiry—Domiciled foreigner temporarily in England - - - - - 426
See LUNACY.

—— Marriage — Capacity — Italian subjects — Deceased husband's brother - 751
See CONFLICT OF LAWS. 3.

—— Next of kin—Sister of the half-blood—Nephews and nieces—Foreign law 483
See WILL. 9.

—— Unattested will — Domiciled foreigner—Leaseholds - - - - 24
See CONFLICT OF LAWS. 1.

DONATIO MORTIS CAUSÂ—*Building Society Share Certificates—Post Office Savings Bank Deposit-book—Evidence—Delivery.*

W. was possessed of eight investment shares in a building society of 25*l.* each, and 130*l.* in the Post Office Savings Bank. Some two months before his death, and while ill in hospital, W. asked the defendant, to whom he was engaged to be married, to go and get the certificates for his building society shares and savings bank book, gave her the key of the drawer in which they were placed, and told her to keep them; the defendant went and obtained the certificates and savings bank book, took them and the key to the hospital, and offered them back to W., when he again said she was to keep them. On several subsequent occasions W. repeated his wish to the defendant that all his property should belong to her in case of his death. The defendant claimed the building society shares and the money standing to the credit of the deceased at the Post Office Savings Bank:—

Held, that the evidence of the defendant was sufficient to establish the gift, if the building society share certificates and savings bank book could be the proper subject-matter of a gift of this kind, and that there had been sufficient delivery to constitute a valid donatio:

Held, also, that the gift of the building society shares failed as incomplete, but that the Post Office Savings Bank book was capable of being well given so as to create a donatio mortis causâ.

M'Gonnell v. *Murray*, (1869) Ir. R. 3 Eq. 460, distinguished on this point. *In re* WESTON. BARTHOLOMEW *v.* MENZIES - Byrne J. 680

2. —— *Gift of Cheque drawn by Deceased—Non-payment in his Lifetime—Overdrawn Account.*

On February 19, 1901, B., who was very ill and in expectation of death, drew a cheque for 300*l.* in favour of E., to whom it was at once handed. E. indorsed the cheque, and on February 23 it was presented for payment at B.'s bank, where his account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B., and that he required some confirmation of the signature. The Court found that the manager was minded to "lend" the money to pay the cheque if he found that the signature was genuine. B. died on February 25, 1901, without the cheque having been cashed:—

Held, following *Hewitt* v. *Kaye*, (1868) L. R. 6 Eq. 198, and *In re Beak's Estate*, (1872) L. R. 13 Eq. 489, that there was not a valid donatio mortis causâ.

Observations on *Bromley* v. *Brunton*, (1868) L. R. 6 Eq. 275, and *In re Dillon*, (1890) 44 Ch. D. 76, and as regards what amounts to constructive payment of a cheque. *In re* BEAUMONT. BEAUMONT *v.* EWBANK - - Buckley J. 889

DRAINAGE — Preservation of — Restriction of pasturage on road to sheep - 557
See PRESCRIPTION.

DREDGING — Conservators — Navigation — Riparian owner - - - 163
See THAMES.

EASEMENT—*Light—Derogation from Grant—*

EASEMENT—*continued.*

Implication—Building Agreement — Plan —Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

By a building agreement dated in 1884, S. agreed to erect certain specified buildings on an estate belonging to O. which for the purposes of the building scheme was divided into plots, upon each of which a building of a certain character was to be erected. After some of the buildings had been erected, the scheme was departed from to the extent that S., with the consent of O., built upon a site comprising several plots a block of mansions with windows overlooking the adjoining vacant plots. At this time S. contemplated building a corresponding block of mansions upon the adjoining plots, and the wall of the block erected abutting on the adjoining plots was for half its length built as a party wall, while for the rest of its length provision was made for an open area between the block erected and the intended block, and the foundations of the intended block were so laid as to carry out this scheme. The windows of the erected block looked into this area, and over the adjoining site of the intended block. On May 5, 1886, O. conveyed the erected block of mansions to S. by a deed which contained no express general words, and no reservation to O. of any rights in respect of the adjoining plots, but embodied a plan shewing the party wall and the open area. The second block of mansions was never built, and O. subsequently sold the intended site thereof to S., from whom it was acquired by the defendants, who commenced to build upon it so as to obstruct the access of light to the windows of the mansions, but to a less extent than would have happened if the second block contemplated by S. had been erected. The plaintiffs, who were the successors in title of S., claimed an injunction on the ground that by s. 6 of the Conveyancing Act, 1881, an express grant of light was imported into the conveyance of May 5, 1886, and that O. could not derogate from his grant by conveying the adjoining land freed from the easement:—

Held, that having regard to the circumstances existing at the date of the conveyance of May 5, 1886, it did not as against O. pass to S. any right to have the access of light unobstructed by any future building on the adjoining ground.

Birmingham, Dudley and District Banking Co. v. *Ross*, (1888) 38 Ch. D. 295, applied and followed. GODWIN *v.* SCHWEPPES, LIMITED
Joyce J. 926

ECCLESIASTICAL LAW—*Advowson—Patron — Infant—Trustees to Present during Minority—Guardian—Statute—Construction.*

An Act authorized the sale of glebe land with the consent of the patron, to be given in case of the infancy of the patron by his guardian.

An infant was tenant in tail male under a settlement which gave trustees the right of presentation during the minority of the tenant in tail:—

Held, that the trustees were not patrons within the meaning of the Act, and that the guardian of the infant was the proper person to give the consent of the patron to a sale of glebe land. LEIGH *v.* LEIGH - **Swinfen Eady J. 400**

ELECTION—Will—Appointment void for remoteness - - - - - - **436**
See POWER OF APPOINTMENT. 3.

ELECTRIC LIGHT—*Default in Payment by Consumer—Electric Lighting Company—Power to cut off Current— Change of Occupancy — Existing Supply of Current—Receiver appointed by Court —Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 21—*Electric Lighting Orders Confirmation* (*No.* 2) *Act*, 1889 (52 & 53 *Vict. c. clxxviii.*), *Schedule* (*London Electric Supply*), *s.* 47.

Under s. 19 of the Electric Lighting Act, 1882, no person within the area supplied with electric current by an electric lighting company is entitled to a supply of current by the company unless and until he has entered into a contract with the company for the purpose.

Therefore, upon a change in the occupation of premises to which current is being supplied by an electric company, there being a debt due to the company from the outgoing occupier in respect of current already supplied to him, the company are entitled to discontinue the supply until the new occupier has entered into a contract with them for a supply to him.

At the instance of debenture-holders of an hotel company, the Court appointed a receiver of the undertaking and property of the company. The order directed the company to deliver to the receiver possession of the hotel "so far as is necessary for the purpose of such receivership," and the receiver at once took possession of the hotel. At this time electric current for lighting the hotel was being supplied by an electric lighting company, and a large sum was due to them from the hotel company for current already supplied:—

Held, that the electric company were entitled to discontinue the supply of current until the receiver had entered into a new contract with them for its supply.

Decision of Kekewich J. reversed. HUSEY *v.* LONDON ELECTRIC SUPPLY CORPORATION
C. A. 411

—— Capital money, Application of—Alterations and additions with a view to letting **97**
See SETTLED LAND. 2.

—— Turnpike trustees—Road originally conveyed in fee—Vesting in urban authority —Overhead wires - - - **866**
See LOCAL GOVERNMENT.

ENCYCLOPÆDIA — Author and publisher — Ownership of copyright in contributions
See COPYRIGHT. 1. **264**

ESTATE DUTY—Appointed fund—Residue—Testamentary expenses - - **248**
See REVENUE.

—— Costs of administering trust fund - **457**
See PRACTICE. 4.

ESTATE TAIL—"Issue"—Estate in special tail —Rule in *Shelley's Case* - - **34**
See WILL. 5.

ESTOPPEL—Copyright—Infringement—Agent
See COPYRIGHT. 2. **631**

—— Power of attorney—Borrowing by agent—Excess of authority—Misappropriation —Liability - - - - **816**
See PRINCIPAL AND AGENT. 2.

EVIDENCE—Admissibility—Charitable legacy—General or limited charitable purposes *See* CHARITY. 1. 214

—— Delivery—Building society share certificates—Post Office Savings Bank deposit-book - - - - - 680
See DONATIO MORTIS CAUSÂ. 1.

—— Dividends—Profits available for distribution—Expert evidence - - 353
See COMPANY. 6.

—— Legatee entitled to share on surviving testator—Disappearance—No evidence of death—Presumption - - 723
See WILL. 6.

EXECUTION—Married woman—Appointment by will—Administrator with will annexed—Right to receive fund - - 552
See POWER OF APPOINTMENT. 1.

EXECUTOR—Shares—Agreement to vote in a particular way—Directors - 530
See COMPANY. 9.

—— When becoming trustee - - 176
See TRUSTEE. 3.

—— Will—Sale by general executors—Concurrence of special executors - - 187
See VENDOR AND PURCHASER. 6.

EXONERATION—Collective devise of real estate—Aggregation of charges—Exoneration of personal estate - - - 203
See WILL. 3.

FILING—Shares paid for otherwise than in cash—Omission to file contract - 238
See COMPANY. 13.

FINAL ORDER—Interlocutory or—Appeal—Solicitor—Summons for taxation 29
See PRACTICE. 1.

FINANCE ACT—Estate duty—Appointed fund—Residue—Testamentary expenses 248
See REVENUE.

FINE—Surrender of lease—Capital or income—Tenant for life and remainderman
See SETTLED LAND. 3, 4. 941, 942, n.

FISHING—Demise of exclusive right of fishing—Covenant against assignment—Grant by lessee of limited licence to fish 72
See LANDLORD AND TENANT.

FIXTURES—Gift of "furniture and other personal effects"—Effect as regards fixtures and trade furniture - - - 717
See WILL. 4.

FOREIGN LAW—Next of kin—Sister of the half-blood—Nephews and nieces—Domicil - - - - 483
See WILL. 9.

FOREIGNER—Lunacy—Jurisdiction—Inquiry—Domiciled foreigner temporarily in England - - - - 426
See LUNACY.

—— Unattested will—Domiciled foreigner—Leaseholds - - - - 24
See CONFLICT OF LAWS. 1.

FORFEITURE—Tenant for life—Non-residence—Validity of condition—Compromise
See SETTLED LAND. 6. 378

FORGED POWER—Attorney innocently acting under—Liability of agent—Third party—Indemnity - - - 610
See PRINCIPAL AND AGENT. 1.

FRENCH LAW—Payment out of court—French subject entitled—"Prodigal" - 488
See CONFLICT OF LAWS. 2.

FRIENDLY SOCIETY—*Life Policy—Assignment—Nomination—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-s.* 3—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 56, 57.

Policies effected under the Friendly Societies Act, 1875, and, *semble*, under the Friendly Societies Act, 1896, are assignable in the ordinary way as well as by nomination under the Acts.

Caddick v. *Highton*, [1901] 2 Ch. 476, n., and *In re Redman*, [1901] 2 Ch. 471, overruled on this point. *In re* GRIFFIN. GRIFFIN *v.* GRIFFIN C. A. 135

"FURNITURE"—Gift of "furniture and other personal effects"—Effect as regards fixtures and trade furniture - 717
See WILL. 4.

GOODWILL—Debenture—"Property"—Jurisdiction to appoint manager - - 332
See COMPANY. 1.

GRANT—Derogation from—Implication—Light—Building agreement—Plan - 926
See EASEMENT.

—— Nature of presumed lost grant—Right to use of water - - - - 649
See WATER.

—— Presumption of lost grant—Presumption of legal origin to support long user - 557
See PRESCRIPTION.

GUARANTEE—Bond to secure fidelity of employee—Death of surety—Determination of liability - - - 733
See PRINCIPAL AND SURETY.

GUARDIAN—Infant—Advowson—Patron—Trustees to present during minority
See ECCLESIASTICAL LAW. 400

—— Infant tenant for life—Possession during minority—Trustee - - - 391
See SETTLED LAND. 8.

—— Removal of—Ward of Court—Testamentary guardian—Guardian's change of religion
See INFANT. 2. 688

HEIRLOOMS—*Bequest to descend with Dignity—Period of Absolute Vesting.*

A testatrix bequeathed diamonds to her son Viscount Hill (who survived her) "until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds shall descend as heirlooms as far as the rules of law and equity will permit."

Held, that the case was governed by *Tolle-*

HEIRLOOMS—*continued.*

mache v. *Earl of Coventry*, (1834) 2 Cl. & F. 611; 37 R. R. 260, and that, notwithstanding the words "as far as the rules of law and equity will permit," on the death of Viscount Hill, the son of the testatrix, his successor in the title became absolutely entitled to the diamonds.

Decision of Swinfen Eady J., [1902] 1 Ch. 537, affirmed. *In re* HILL. HILL *v.* HILL **C. A. 807**

HIGHWAY—Drainage, Preservation of—Restriction of pasturage on road to sheep **557**
See PRESCRIPTION.

—— Street—Overhead wires - - **866**
See LOCAL GOVERNMENT.

HOTCHPOT—Advancements to children—Intestacy - - - - - **218**
See DISTRIBUTIONS, STATUTE OF.

HUSBAND AND WIFE — *Married Woman — Restraint on Anticipation — Rule against Perpetuities—Severance of Class.*

A restraint on anticipation, imposed by a general clause in a will upon all the shares of daughters of the testator's children, is good as to the shares of those members of the class who are born in the testator's lifetime, though void as to the shares of those born afterwards.

Herbert v. *Webster*, (1880) 15 Ch. D. 610, followed.

In re Michael's Trusts, (1877) 46 L. J. (Ch.) 651; *In re Ridley*, (1879) 11 Ch. D. 645, not followed. *In re* FERNELEY'S TRUSTS
Swinfen Eady J. 543

—— Acknowledgment (Separate)—Mortgage — Reconveyance — Married woman — Trustee mortgagee—Concurrence of husband - - - - - **451**
See DEED.

—— After-acquired property — Covenant — "During the marriage"—Judicial separation - - - - **82**
See SETTLEMENT. 1.

—— Power — Execution — General power — Married woman—Appointment by will — Administrator with will annexed — Right to receive fund - - **552**
See POWER OF APPOINTMENT. 1.

—— Real property limitation—Action to recover land—Person under disability—Claim by husband in right of wife - **512**
See LIMITATIONS, STATUTE OF.

—— "Wife"—Named legatee misdescribed as wife - - - - - **936**
See WILL. 8.

IMPROVEMENTS—Income or capital chargeable
See SETTLED LAND. 1. **711**

INCLOSURE—Restriction of pasturage on road to sheep—Drainage, Preservation of **557**
See PRESCRIPTION.

INCOME—Capital or—Fine on surrender of lease —Tenant for life and remainderman
See SETTLED LAND. 3, 4. **941, 942, n.**

—— Gift of residue to individuals in shares—Gift of income for maintenance of all—Vested or contingent - - **945**
See WILL. 10.

INDEMNITY—Administration — Trustee carrying on testator's business—Creditors—Defaulting trustee - - - **342**
See TRUSTEE. 1.

—— Attorney innocently acting under forged power—Liability of agent—Third party
See PRINCIPAL AND AGENT. 1. **610**

INFANT — *Maintenance — Accumulations — Contingent Life Interest—Right to Accumulations—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2.

A testator gave his residuary property to trustees, upon trust for conversion and to hold a portion of the proceeds upon trust for his children who being sons should attain twenty-five, or being daughters should attain twenty-one or marry, to be divided between them in equal shares, and he directed his trustees to retain the share of each daughter, upon trust to pay the income to her for life, and after her death for her children.

Two of the daughters, having attained twenty-one, claimed payment of the accumulations of such part of the income in the meantime of their shares as had not been applied for their maintenance:—

Held, that they were the persons who had become ultimately entitled to the property from which the accumulations had arisen within the meaning of s. 43, sub-s. 2, of the Conveyancing Act, 1881, and that the accumulations must be paid to them.

Semble, that the meaning of sub-s. 2 is as follows: The trustees shall hold the accumulations for the benefit of the person who in the events which happen becomes entitled to the income from the accumulation of which the accumulations arise. *In re* SCOTT. SCOTT *v.* SCOTT
Buckley J. 918

2. —— *Ward of Court—Testamentary Guardian —Guardian's Change of Religion—Removal of Guardian.*

A testator, who died in 1896, by his will appointed his sister guardian of his infant daughter, then aged eleven. The testator was a Protestant, and the infant was brought up in that faith. In 1900 the sister, from conscientious motives, became a Roman Catholic:—

Held, that, under the circumstances, it was for the benefit of the infant that the testator's sister should be removed from her guardianship. F. *v.* F. - - - - **Farwell J. 688**

—— Advowson — Patron — Trustees to present during minority—Guardian - **400**
See ECCLESIASTICAL LAW.

—— Building society—Power to mortgage for advances—Purchase of land by infant—Lien for purchase-money - - **1**
See BUILDING SOCIETY.

—— Tenant for life—Possession during minority —Guardian—Trustee - - **391**
See SETTLED LAND. 8.

INFRINGEMENT—Copyright—"Print or cause to be printed"—Agent—Estoppel **631**
See COPYRIGHT. 2.

INHERITANCE—*Root of Descent—"Purchaser" —Devise to Testator's "Right Heirs"—Co-heiresses*

INHERITANCE—*continued.*

—*Joint Tenancy or Co-parcenary — Inheritance Act*, 1833 (3 & 4 *Will.* 4, *c.* 106), *s.* 3.

Under a devise to or in turn for a testator's "right heirs," the person who at the time of the testator's death is his heir-at-law takes now, by virtue of s. 3 of the Inheritance Act, 1833, as devisee, and not by descent as before the Act.

The word "heir" in that section includes "heirs."

And s. 3 operates also to alter the quality of the estate taken by the heir; so that, if a testator leaves co-heiresses, they, under such a devise, take as joint tenants, not as co-parceners.

Decision of Farwell J. affirmed.

Re Baker, (1898) 79 L. T. 343, approved.

OWEN *v.* GIBBONS - - - C. A. 636

INJUNCTION — Mandatory — Ancient lights — Prescription — "Substantial" interference - - - - 302
See LIGHT AND AIR.

—— Ultra vires—Objects—Ancillary powers—Declaration that all clauses independent
See COMPANY. 7. 745

INN—Licences in jeopardy—Recovery of possession—Disputed title - - 386
See RECEIVER.

INN OF CHANCERY—Study of the law—Failure of object—Disposition of property 774
See CHARITY. 3.

INSURANCE, LIFE.—*Policy of Insurance made Payable to Another — Purchase in Name of a Stranger—Presumption of Intention — Resulting Trust.*

A policy of insurance was taken out by A. on his own life "for behoof of B.," his wife's sister, and the policy provided that B., her executors, administrators, and assigns, should be entitled to receive the policy moneys on A.'s death. A., who survived B., retained the policy, and paid the premiums till his death:—

Held, that the legal personal representatives of B. were trustees of the policy moneys for the legal personal representatives of A. *In re* A POLICY NO. 6402 OF THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY - - Joyce J. 282

—— Friendly society—Life policy—Assignment—Nomination - - - 135
See FRIENDLY SOCIETY.

INTEREST — Conditions of sale — Delay — Damages—Loss of expected profits 191
See VENDOR AND PURCHASER. 1.

—— Conditions of sale—Wilful default - 226
See VENDOR AND PURCHASER. 2.

—— Dividend—Profit — Fixed capital — Circulating capital - - - 353
See COMPANY. 6.

—— Mine-owner stopped from working mines within prescribed distance—Interest on compensation moneys - - 901
See RAILWAY. 1.

—— Several estates comprised in same devise—Interest on charges - - 347
See SETTLEMENT. 2.

INTERLOCUTORY MATTER — Summons for directions — Order in chambers dismissing action—Jurisdiction - 477
See PRACTICE. 8.

INTERLOCUTORY ORDER—Final or—Appeal—Solicitor—Summons for taxation 29
See PRACTICE. 1.

INTERNATIONAL LAW—"Mobilia sequuntur personam"—English fund belonging to Austrian who has died without heirs—Right of succession - - 847
See BONA VACANTIA.

INTESTACY — Advancements to children — Hotchpot - - - - 218
See DISTRIBUTIONS, STATUTE OF.

INVESTMENT—Improper investment by trustees—Power to invest on real security in Ireland—Puisne mortgage - 785
See TRUSTEE. 2.

—— Sale of tenant for life's interests — Compromise - - - - 378
See SETTLED LAND. 6.

IRELAND—Power to invest on real security in—Improper investment by trustees—Puisne mortgage - - - 785
See TRUSTEE. 2.

—— Service in—Application for leave—Third-party notice—Contribution - 287
See PRACTICE. 7.

"ISSUE" — Estate in special tail — Rule in *Shelley's Case* - - - 34
See WILL. 5.

ITALY—Marriage—Capacity — Italian subjects—Deceased husband's brother - 751
See CONFLICT OF LAWS. 3.

JOINT TENANCY—Co-parcenary or—Devise to testator's "right heirs"—Co-heiresses
See INHERITANCE. 636

JUDICIAL SEPARATION—After-acquired property — Covenant — "During the marriage" - - - - 82
See SETTLEMENT. 1.

JUDICIAL TRUSTEES—Improper investment by trustees — Power to invest on real security in Ireland—Puisne mortgage
See TRUSTEE. 2. 785

JURISDICTION — Lunacy — Inquiry—Domiciled foreigner temporarily in England 426
See LUNACY.

—— Mansion-house—Dilapidations — Salvage—Repairs—Expenditure out of capital 15
See WILL. 7.

—— Service out of jurisdiction—Third-party notice—Contribution - - 287
See PRACTICE. 7.

—— Summons for directions — Interlocutory matter—Order in chambers dismissing action - - - - 477
See PRACTICE. 8.

—— To appoint manager—Debenture—Goodwill—"Property" - - - 332
See COMPANY. 1.

JURISDICTION—*continued.*

—— Trustee—Discharge—No new trustee appointed—Administration action - **692**
See TRUSTEE. 4.

LAND TRANSFER — *Registration — Conditions annexed to Title—Building Restrictions—Modification—Consent—"Persons Principally Interested"—Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 84.

Certain building land in Middlesex, forming part of a larger estate belonging to the defendants and registered with an absolute title, was sold by them to the plaintiff company. The defendants, in order to protect their remaining property, exacted from the company certain restrictive conditions as to the class of houses to be built upon the purchased land, and these conditions were registered against the title of the company. The company applied under s. 84 of the Land Transfer Act, 1875, with the consent of the defendants, for an order modifying these conditions by reducing the minimum size and value of the houses. The company had mortgaged the purchased land, and had also sold off several plots to various purchasers, and the defendants had contracted to sell their remaining property. The consent of all parties, except the purchasers of three outlying plots, had been obtained:—

Held, (1.) that the Court ought to accept the consent of the parties interested, if competent to consent, as sufficient proof within s. 84 that the modifications would be beneficial to them; (2.) upon the evidence, that, in the absence of consent, this fact was not proved to the satisfaction of the Court; (3.) that all the persons who took with notice of the conditions were bound by them and were "persons principally interested" in the enforcement of them within the section, and that the order could only be made subject to their consent being obtained.

Observations as to the meaning of "persons principally interested." GROUND RENT DEVELOPMENT COMPANY *v.* WEST - **Kekewich J. 674**

—— Costs—Administration action—Real and personal estate—Apportionment - **92**
See PRACTICE. 2.

—— Will—Sale by general executors—Concurrence of special executors - **187**
See VENDOR AND PURCHASER. 6.

LANDLORD AND TENANT—*Lease—Construction—Demise of Exclusive Right of Fishing—Covenant against Assignment—Grant by Lessee of Limited Licence to Fish.*

By an indenture of lease the defendant demised to the plaintiff the exclusive right of fishing in a certain portion of a river, "together with full liberty of ingress, egress, and regress for the said lessee and his authorized friends at all times" during the term thereby granted "to fish with rods and lines in a proper and sportsmanlike manner . . . and the fish which they shall then and there take and retain to his and their own use." The lessee covenanted that he would not during the term "underlet, assign, transfer, or set over, or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over unto any person or persons whomsoever" without the consent in writing of the lessor, his heirs or assigns:—

Held, that, inasmuch as the covenant did not expressly apply to "any part" of the premises as well as to the whole, the lessee was not precluded from granting a licence to another person (limited to two rods) to fish in the river during the residue of the term granted by the lease.

Dictum of Lord Eldon in *Church* v. *Brown*, (1808) 15 Ves. 258; 10 R. R. 74, followed. GROVE *v.* PORTAL - - - **Joyce J. 727**

—— Constructive notice—Adverse title—Notice by tenancy - - - - **428**
See VENDOR AND PURCHASER. 4.

—— Lease—"Best rent"—Collusive bargain for reduction of rent - - - **599**
See SETTLED LAND. 9.

—— Public-house—Licences in jeopardy—Recovery of possession—Disputed title **386**
See RECEIVER.

LANDS CLAUSES ACT—Sheriff's costs—"Deduction" from purchase-money - **326**
See PRACTICE. 3.

LAPSE — "Charitable institution," Meaning of —Legacy—Non-existence of institution named—Cy-près - - - **876**
See CHARITY. 4.

LAW—Charitable purpose—Inn of Chancery—Study of the law—Failure of object—Disposition of property - - **774**
See CHARITY. 3.

LEASE.
See under LANDLORD AND TENANT.

—— Fine on surrender of lease—Tenant for life and remainderman—Capital or income
See SETTLED LAND. 3, 4. **941, 942, n.**

LEASEHOLDS—Capital money, Application of—Alterations and additions with a view to letting—Electric light installation
See SETTLED LAND. 2. **97**

—— Improvements—Income or capital chargeable - - - - - **711**
See SETTLED LAND. 1.

—— Unattested will—Domiciled foreigner **24**
See CONFLICT OF LAWS. 1.

LEGACY.
See under WILL.

LETTING—Alterations and additions with a view to—Capital money, Application of —Electric light installation - **97**
See SETTLED LAND. 2.

LICENCE—Public-house—Licences in jeopardy—Recovery of possession—Disputed title - - - - - **386**
See RECEIVER.

LIEN—Building society, Purchase-money paid by—Infant member—Power to mortgage for advances - - - **1**
See BUILDING SOCIETY.

—— For deposit—Power to purchaser to rescind in given event - - - **835**
See VENDOR AND PURCHASER. 3.

LIEN—*continued.*

—— Shares—Bankruptcy of member - 467
See COMPANY. 10.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT—Electric light—Street—Overhead wires
See LOCAL GOVERNMENT. 866

—— Electric light installation—Capital money, Application of—Leasehold houses 97
See SETTLED LAND. 2.

—— Electric lighting company—Default in payment by customer—Power to cut off current - - - - 411
See ELECTRIC LIGHT.

LIGHT AND AIR—*Ancient Lights—Prescription—"Substantial" Interference—Damage—Measure of Right—Angle of 45 degrees—Mandatory Injunction—Inquiry as to Damage, Refusal of.*

There is no rule of law that ancient lights may be interfered with by a building provided it leaves them an angle of 45 degrees of light; but in judging of the probable effect of a proposed building upon ancient lights the Court may not unreasonably regard the fact that an angle of 45 degrees will be left as primâ facie evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence.

Vaughan Williams L.J. doubted whether, as the law now stands, the supposed 45 degrees rule can now be regarded even as a rough measure of the rights of the owner or occupier of ancient lights.

The principles upon which the Court will grant an injunction against actual or threatened interference with ancient lights stated.

A mandatory injunction was granted by the Court of Appeal, ordering the defendant to pull down so much of his new building (completed since the judgment of the Court below) as interfered with the ancient lights, as theretofore enjoyed, of business premises of which the plaintiffs were lessees and occupiers; it being proved that the interference with the ancient lights by the new building was "substantial," and also caused "real damage" (*Warren* v. *Brown*, [1902] 1 K. B. 15) to the plaintiffs.

The Court refused to direct an inquiry and report by a surveyor as to the injury caused by the defendant's new building in its completed state.

Decision of Joyce J. reversed. HOME AND COLONIAL STORES, LIMITED *v.* COLLS C. A. 302

—— Derogation from grant — Implication — Building agreement—Plan - 926
See EASEMENT.

LIMITATIONS, STATUTE OF—*Real Property—Action to recover Land—Person under Disability—Claim by Husband in Right of Wife—Real Property Limitation Acts* (3 & 4 *Will.* 4, *c.* 27, *ss.* 16, 17, 34; 37 & 38 *Vict. c.* 57, *ss.* 3, 5)—*Will—Construction—Gift of "all the Share of my late Husband's Estate"—Real Estate, whether passed.*

B. died intestate in December, 1869, possessed of copyholds held of the manor of Taunton Dene, which by the custom of that manor devolved upon his widow. He left surviving him, besides his widow, his son P. and two daughters, of whom one was the plaintiff Mrs. H. The widow died on January 7, 1870, having by her will devised to her two daughters "the share of her late husband's estate" that she took or was entitled to on his decease, to be divided between them share and share alike. She also gave them pecuniary legacies, and declared that she made this provision for them in lieu of the freehold and copyhold lands which descended to her son on the intestacy of her husband; and she appointed H., the husband of Mrs. H., to be her executor. On her death it was erroneously assumed that the Taunton Dene copyholds had, upon B.'s death, devolved upon P. as his customary heir, and from that time the rents were collected by H., and applied to the maintenance of P. until he attained twenty-one, in 1878, when H. accounted to him and handed over the title-deeds. P. continued in possession till his death in 1890, having devised all his real estate to the defendants. The facts as to the devolution of the copyholds on B.'s death having been discovered, on September 25, 1900, an action was brought by Mrs. H. and her husband in her right for a declaration that they were entitled to a moiety of the copyholds under the will of B.'s widow:—

Held, assuming that the copyholds passed under the will, that inasmuch as P. had been in possession through H. from the death of the widow, the action was barred by s. 5 of the Real Property Limitation Act, 1874, it not having been brought within thirty years of January 7, 1870, when the plaintiffs' right first accrued; but,

Semble, on the construction of the will, the copyholds did not pass thereunder. HOUNSELL *v.* DUNNING - - - - Joyce J. 512

—— Breach of trust—"Action to which no existing Statute of Limitations applies" 176
See TRUSTEE. 3.

LOCAL GOVERNMENT—*Street—Urban Authority—Turnpike Trustees—Road originally Conveyed in Fee—Vesting in Urban Authority—Overhead Wires—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Turnpike Roads Act*, 1822 (3 *Geo.* 4, *c.* 126)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 11, 64.

When the site of a road was originally conveyed to turnpike trustees in fee simple for the purpose of making a road under the Turnpike Roads Acts, and the road has afterwards become a highway, the whole estate which was vested in the trustees, i.e., the fee simple, vests under the Public Health Act in the urban authority, and they are entitled to prevent electric wires being carried over the road at any height whatever.

Wandsworth Board of Works v. *United Telephone Co.*, (1884) 13 Q. B. D. 904, distinguished. FINCHLEY ELECTRIC LIGHT COMPANY *v.* FINCHLEY URBAN DISTRICT COUNCIL - Farwell J. 866

LOCKE KING'S ACTS—Collective devise of real estates—Aggregation of charges—Exoneration of personal estate - 203
See WILL. 3.

LONDON—*Sanitary Authority—Power to provide Sanitary Conveniences — Subway Approaches—Subsoil of Road—Vesting in Sanitary Authority—Owner of Property adjoining Road—Property in Subsoil ad medium filum—Presumption—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

By the Public Health (London) Act, 1891, s. 44, sanitary authorities have power to provide public conveniences in situations where they deem the same to be required, and for this purpose the subsoil of any road, exclusive of the footway, is vested in the sanitary authority.

Where a sanitary authority had constructed in the middle of a street an underground convenience, with underground approaches having entrances at either side of the street:—

Held, that, the primary object being the construction of the convenience with the requisite means of approach thereto, the fact that the approaches might be used for the purpose of crossing the street independently of the convenience did not constitute the works a subway which the authority had no power to make.

Shortly before the construction of the works the footway had been increased in width. One of the entrances was constructed partly in the subsoil of the road and partly in that of the footway as so increased:—

Held, that inasmuch as by presumption of law the subsoil of the road ad medium filum viæ belonged to the owner of the adjoining premises, and the vesting of the subsoil in the sanitary authority for the purpose of making the convenience did not extend to the footway, the works in so far as they encroached upon the footway as it existed at the commencement of the works constituted a trespass; and in an action by the adjoining owner a mandatory injunction was granted for their removal. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* WESTMINSTER CORPORATION - - - **Joyce J. 269**

LUNACY — *Jurisdiction — Inquiry — Domiciled Foreigner temporarily in England.*

The Court in Lunacy has jurisdiction to order an inquiry into the state of mind of a domiciled foreigner who is temporarily resident in England. *In re* BURBIDGE - - - **C. A. 426**

MAINTENANCE — Accumulations, Right to — Contingent life interest - - **918**
See INFANT. 1.

—— Residue to individuals in shares, Gift of — Gift of income for maintenance of all — Vested or contingent - - **945**
See WILL. 10.

MANAGER—Jurisdiction to appoint—Debenture—Goodwill—"Property" - **332**
See COMPANY. 1.

MANDATORY INJUNCTION—Ancient lights—Prescription — "Substantial" interference—Angle of 45 degrees - **302**
See LIGHT AND AIR.

MANSION-HOUSE — Dilapidations — Salvage — Repairs—Expenditure out of capital—Jurisdiction - - - **15**
See WILL. 7.

MARRIAGE—Capacity—Italian subjects—Deceased husband's brother - **751**
See CONFLICT OF LAWS. 3.

—— "During the marriage" — After-acquired property — Covenant — Judicial separation - - - - - **82**
See SETTLEMENT. 1.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MATRIMONIAL CAUSES—After-acquired property — Covenant — "During the marriage"—Judicial separation - **82**
See SETTLEMENT. 1.

MAXIM—"Mobilia sequuntur personam" **847**
See BONA VACANTIA.

MEMORANDUM OF ASSOCIATION—Company.
See Cases under COMPANY.

MINE—Interest on compensation moneys—Mine-owner stopped from working mines within prescribed distance - - **901**
See RAILWAY. 1.

MISAPPROPRIATION—Agent, Borrowing by—Excess of authority—Notice—Liability **816**
See PRINCIPAL AND AGENT. 2.

MISDESCRIPTION — "Wife" — Named legatee misdescribed as wife - - **936**
See WILL. 8.

MISREPRESENTATION—Shares—Subscriptions obtained by misrepresentation—Winding-up—Contributory - - **707**
See COMPANY. 11.

MONEY HAD AND RECEIVED—Agent, Borrowing by—Excess of authority—Misappropriation—Notice—Liability **816**
See PRINCIPAL AND AGENT. 2.

MORTGAGE — *Clog on Redemption — Agreement subsequent to Mortgage—Option to Purchase Mortgaged Property—Conditional Sale.*

On April 23, 1896, an agreement was entered into between the plaintiffs and the defendant by which the plaintiffs agreed to lend the defendant 5000*l.*, which was to be secured by a first mortgage of a ship belonging to the defendant, and was to be made payable six months from the date of the mortgage. If interest was regularly paid the plaintiffs were not to call in, and the defendant was not to compel them to receive, the principal before the expiration of two years from the date of the mortgage. If at any time within two years from April 23, 1896, the plaintiffs should elect to enter into partnership with the defendant, they were to be at liberty to do so, in which case they were to relieve the defendant from payment of the mortgage money, and transfer the ship free from the mortgage for the purposes of the partnership. The capital, of which the ship was to form part, was to belong to the plaintiffs and the defendant in equal shares.

On July 4, 1896, the defendant executed a statutory mortgage of the ship to the plaintiffs.

The plaintiffs did not within the two years elect to enter into partnership with the defendant, and no part of the 5000*l.* was paid.

On June 27, 1898, the defendant executed a mortgage to the plaintiffs of some wharves as a

further security for 2000*l.*, part of the 5000*l.* By this deed the defendant covenanted for the repayment of the 2000*l.* on December 27, 1898, and there was a proviso for redemption upon payment on that day.

On July 9, 1898, another agreement was entered into between the plaintiffs and the defendant. It contained a recital of the agreement of April 23, 1896, and of the mortgages of July 4, 1896, and June 27, 1898; a recital that the plaintiffs had applied to the defendant for repayment of the 5000*l.*, and that he was unable to repay it; and that he had requested them to extend the term of two years for a further period of five years, which they had agreed to do upon the terms thereinafter appearing. It was then agreed and declared that, if at any time within the further period of five years the plaintiffs should elect to enter into partnership with the defendant, they should be at liberty to do so, in which case the plaintiffs were to release the defendant from payment of the 5000*l.*, and to transfer the ship free from the mortgage for the purposes of the partnership. The capital of the partnership, of which the ship was to form part, was to belong to the plaintiffs and the defendant in equal shares.

On February 24, 1900, the plaintiffs gave notice in writing to the defendant that they elected to enter into partnership with him. He refused to allow them to do so; and they thereupon brought an action to compel specific performance of the contract constituted by the agreement of July 9, 1898, and the notice of February 24, 1900, or, in the alternative, payment of damages for breach of contract, in which case the plaintiffs claimed the right to enforce their securities for the 5000*l.* and interest.

The defendant alleged that the agreement of July 9, 1898, was invalid, because it clogged the equity of redemption; and by a counter-claim he asked that that agreement might be delivered up to be cancelled, and a declaration that he was entitled to redeem the securities:—

Held, by Buckley J., that the mortgage of June 27 and the agreement of July 9, 1898, formed really one transaction, but that, as the condition which gave the mortgagees an option in effect to purchase a moiety of the mortgaged property must be performed (if at all) before the legal right of redemption would arise, and consequently before there could be any equitable right of redemption, the transaction was valid as a conditional sale, and the rule against clogging an equity of redemption had no application:

Held, by the Court of Appeal, that the mortgage of June 27 and the agreement of July 9, 1898, were separate and independent transactions, and that, the fairness of the agreement of July 9 not being impeached, there was no reason why the mortgagor and the mortgagees should not subsequently to the date of the mortgage enter into an arrangement which might have the effect of depriving the mortgagor of his equity of redemption.

On this ground the decision of Buckley J. was affirmed.

But the Court of Appeal expressly stated that they must not be understood as assenting to the

view of the law expressed by Buckley J. LISLE *v.* REEVE - - - - - **C. A. 53**

2. —— *Consolidation — Redemption — Legal Mortgage—Subsequent Equitable Mortgage between the same Parties but of different Property—Agreement to execute Legal Mortgage as the Mortgagee may require—Clause excluding s.* 17 *of the Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41.)

The plaintiff mortgaged freeholds by a deed which contained no provision excluding the operation of s. 17 of the Conveyancing Act, 1881, which abolishes consolidation of mortgages. She subsequently made an equitable mortgage of other property to the same mortgagee, and signed a memorandum whereby she agreed at any time during the continuance of the security to execute a legal mortgage with such powers and provisions and in such form as the mortgagee might require for further securing the principal and interest.

Held (following *Whitley* v. *Challis*, [1892] 1 Ch. 64), that this covenant was not intended to enlarge the subject-matter of the security, and, therefore, that the mortgagee was not entitled to have executed by the plaintiff a legal mortgage containing a clause excluding the operation of s. 17. FARMER *v.* PITT - - **Byrne J. 954**

3. —— *Redemption—Mortgagee's Costs—Costs of negotiating Loan and preparing Mortgage Deed.*

A mortgagee's solicitor's costs of negotiating the loan and preparing the mortgage deed become, on completion of the transaction, a simple contract debt at common law due to the mortgagee by the mortgagor; and cannot be added by the mortgagee to his security as part of the costs, charges, and expenses properly incurred under or by virtue of his mortgage. WALES *v.* CARR - - - - **Farwell J. 860**

4. —— *Shares in Company—Implied Power of Sale—Notice to Mortgagor—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *ss.* 19, 20.

The mortgagee of shares (the mortgage not being by deed) has, in the absence of an express power of sale, an implied power to sell the shares on default by the mortgagor in payment of the amount due at the time appointed for payment, or, if no time be fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a day certain.

Per Stirling and Cozens-Hardy L.JJ.: A month's notice, or even less, would be a reasonable notice.

Sects. 19 and 20 of the Conveyancing Act, 1881, do not affect the power of sale which is implied in the case of a mortgage of shares not made by deed.

Decision of Farwell J., [1901] 1 Ch. 70, that the defendants were justified in selling shares which had been mortgaged to them by the plaintiff, without any express power of sale, affirmed, Vaughan Williams L.J. dissenting, on the ground that a proper notice, requiring payment of the mortgage debt on a day certain, had not been given by the defendants to the plaintiff. DEVERGES *v.* SANDEMAN, CLARK & Co. **C. A. 579**

MORTGAGE—*continued.*

—— Building society—Infant member—Power to mortgage for advances—Purchase-money—Lien - - - 1
See BUILDING SOCIETY.

—— Collective devise of real estates—Aggregation of charges—Exoneration of personal estate - - - - 203
See WILL. 3.

—— Costs — Taxation — Solicitor-mortgagee — Negotiation fee - - - 741
See SOLICITOR. 2.

—— Reconveyance—Married woman — Trustee mortgagee—Concurrence of husband—Separate acknowledgment - 451
See DEED.

—— Several estates comprised in same devise—Interest on charges - - 347
See SETTLEMENT. 2.

—— Shares—Registration—Transfer in blank—Equitable mortgage—Notice—Priority. *See* COMPANY. 12. 522

—— Tenant for life—Mortgage to discharge incumbrances—"Required" - 87
See SETTLED LAND. 10.

—— Trustees, Improper investment by—Power to invest on real security in Ireland—Puisne mortgage - - - 785
See TRUSTEE. 2.

MORTMAIN—Trust for sale—Right of trustees to retain land unsold - - 841
See CHARITY. 2.

NAVIGATION — Conservators — Dredging—Riparian owner - - - 163
See THAMES.

NEXT OF KIN—Sister of the half-blood—Nephews and nieces—Domicil—Foreign law - - - - - 483
See WILL. 9.

NOMINATION—Friendly society—Life policy—Assignment - - - 135
See FRIENDLY SOCIETY.

NOTICE—Constructive notice—Adverse title—Notice by tenancy - - - 428
See VENDOR AND PURCHASER. 4.

—— Constructive notice—Power of attorney—Borrowing by agent—Excess of authority—Misappropriation—Liability 816
See PRINCIPAL AND AGENT. 2.

—— Person acting as secretary of two companies—Knowledge in one character—Presumption of notice in other character
See COMPANY. 14. 507

—— Public-house — Licence in jeopardy—Recovery of possession—Disputed title 386
See RECEIVER.

—— Purchaser for value without notice — Doubtful title - - - 599
See SETTLED LAND. 9.

—— Service out of jurisdiction—Third-party notice—Contribution - - 287
See PRACTICE. 7.

NOTICE—*continued.*

—— Shares—Registration—Transfer in blank—Equitable mortgage—Priority - 522
See COMPANY. 12.

—— Shares in company—Implied power of sale—Notice to mortgagor - - 579
See MORTGAGE. 4.

ONUS PROBANDI—Legatee entitled to share on surviving testator—Disappearance—No evidence of death - - - 723
See WILL. 6.

OPTION TO PURCHASE—Clog on redemption—Agreement subsequent to mortgage—Conditional sale - - - 53
See MORTGAGE. 1.

ORIGINATING SUMMONS — Administration — Costs out of estate—Costs "as between solicitor and client" - - 436
See POWER OF APPOINTMENT. 3.

—— Articles of association—Questions affecting class of shareholders - - 898
See PRACTICE. 5.

PARTICULARS—Of objection—Certificate as to validity of patent being in question 494
See PATENT.

PARTIES—Adding defendant—Joint and several liability of trustees - - 911
See PRACTICE. 6.

PASTURAGE—Lost grant, Presumption of—Presumption of legal origin to support long user - - - - - 557
See PRESCRIPTION.

PATENT—*International Convention—Application by Patentee for Protection in Foreign State—Subsequent Publication of same Patent by another Person in this Country—Later Application by Patentee in this Country for Patent—Anticipation — Certificate of Objections — Certificate as to Validity of Patent being in question—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-ss.* 2, 6, 31, 103, *sub-ss.* 1, 2.

When a patentee has applied under s. 103 of the Patents, Designs, and Trade Marks Act, 1883, for protection for any invention in any foreign State with which the British Government has made an arrangement and afterwards makes an application in this country for his patent, he has two alternatives: he may either take a patent to run from the date of his prior application to the foreign State, or he may take a patent to run from the date of his English application, but in either alternative the date of his application in this country for the patent to which he is entitled under the section if he asks for it must be within seven months from the date of his foreign application: in other words, he must elect from what date his patent is to run within seven months from the date of his foreign application.

The plaintiffs sued and went to trial in respect of an alleged infringement of four patents. At the trial they abandoned their case as to the first three patents and proceeded on the fourth. The

PATENT—*continued.*
Court held that the fourth patent was invalid for want of novelty, and that there had been no infringement even if it had been valid, and dismissed the action with costs:—

Held, that the Court could not give a certificate under s. 29 of the Patent Act, 1883, that the particulars of objection delivered by the defendants in respect of the first three patents were reasonable and proper.

Mandleberg v. *Morley*, (1895) 12 Rep. Pat. Cas. 35, followed.

In respect of the fourth patent the defendants had delivered particulars of objection, including (*a*) a reference to certain inventions which shewed that the patent was void for want of novelty; (*b*) a specification and particulars referring to certain electric furnaces previously invented by other persons. The patent made no claim to an electric furnace as part of the invention, but claimed for a process in which electric furnaces were used:—

Held, that it was a matter for proof and not for particulars of objection to shew what the furnaces were, and that the defendants were not entitled to a certificate under s. 29 as to the particulars of objection (*b*).

The plaintiffs asked that, notwithstanding the fourth patent had been declared invalid, the Court should give them a certificate, under s. 31 of the Act, that the validity of the patent had come in question:—

Held, that the certificate under the section could only be granted where the patent had been declared valid.

Haslam Co. v. *Hall*, (1887) 5 Rep. Pat. Cas. 1, 27 (see also ibid. 144), not followed. ACETYLENE ILLUMINATING COMPANY *v.* UNITED ALKALI COMPANY - - - - **Buckley J. 494**

—— Agreement to grant to promoter and that he or intended company should accept licence to use patent—Privity of contract - - - - - **146**
See CONTRACT.

PATRON—Advowson—Infant—Trustees to present during minority—Guardian **400**
See ECCLESIASTICAL LAW.

PAYMENT INTO COURT—Denial of liability—Action "proceeded with"—Costs—Public authorities protection - **197**
See COSTS.

PAYMENT OUT OF COURT—French subject entitled—Conflict of laws—"Prodigal" **488**
See CONFLICT OF LAWS. 2.

—— Sheriff's costs—"Deduction" from purchase-money—Lands Clauses Act - **326**
See PRACTICE. 3.

PERPETUITY — Dignity — Period of absolute vesting—Will—Construction - **537**
See HEIRLOOMS.

—— Married woman—Restraint on anticipation—Rule against perpetuities—Severance of class - - - - **543**
See HUSBAND AND WIFE.

PLAN—Light—Derogation from grant—Implication—Building agreement - **926**
See EASEMENT.

POLICY—Life insurance.
See under INSURANCE, LIFE.

POSSESSION—Infant tenant for life—Possession during minority—Guardian—Trustee **391**
See SETTLED LAND. 8.

—— Recovery of possession — Public-house — Licences in jeopardy—Disputed title **386**
See RECEIVER.

POST OFFICE — Savings bank deposit-book — Evidence—Delivery - - **680**
See DONATIO MORTIS CAUSÂ. 1.

POWER OF APPOINTMENT — *Execution — General Power—Married Woman—Appointment by Will—Administrator with the Will annexed—Right to receive Fund.*

An administrator with the will annexed can give a valid receipt for settled personalty appointed by will under a general power, even where the appointor was a married woman who died before the coming into operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Re Philbrick's Trusts, (1865) 13 W. R. 570, and *In re Hoskin's Trusts*, (1877) 5 Ch. D. 229; 6 Ch. D. 281, applied. *In re* PEACOCK'S SETTLEMENT. KELCEY *v.* HARRISON **Swinfen Eady J. 552**

2. —— *General Power—Exercise by Will—Extent of Exercise—Intention—Blending of appointed Property with Testator's own Property—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.

A testatrix, who had a general power of appointment over the funds comprised in her marriage settlement, by her will in exercise of the power appointed that the trustees of the settlement should stand possessed of 9000*l.*, part of the funds, in trust for six persons named in the will. And in further exercise of the power she appointed that the trustees should stand possessed of the residue of the funds in trust as to 1000*l.* for W. P. Shaw, and as to the residue thereof in trust for Henry Shaw. And, after bequeathing some specific and pecuniary legacies, the testatrix made the following bequest: "As to the rest and residue of my real and personal estate I devise, bequeath, and appoint the same, subject to the payment thereout of my debts, funeral and testamentary expenses, unto Henry Shaw." Henry Shaw died before the testatrix. The testatrix had personal estate of her own, but she had no real estate:—

Held, by Romer and Cozens-Hardy L.JJ., that the testatrix had by her will exercised the power for all purposes and had blended the settlement funds with her own property, and that the appointed fund, so far as it had lapsed by the death of Henry Shaw, went, subject to the payment thereout of her debts and funeral and testamentary expenses and her pecuniary legacies, to her next of kin, and not to the persons entitled under the settlement in default of appointment:

Held, by Vaughan Williams L.J., that, having regard to other clauses in the will, the testatrix had not shewn an intention to exercise the power for all purposes so as to make the settled fund her own, and that, so far as the appoint-

POWER OF APPOINTMENT—*continued.*

ment had lapsed, the fund went to the persons entitled in default of appointment.

Decision of Byrne J. reversed.

Per Romer L.J.: *In re Davies' Trusts* (1871) L. R. 13 Eq. 163, and *In re De Lusi's Trusts*, (1879) 3 L. R. Ir. 232, distinguished.

Per Cozens-Hardy L.J.: *Coxen* v. *Rowland*, [1894] 1 Ch. 406, approved. *In re* MARTEN. SHAW *v.* MARTEN - - - **C. A. 314**

3. —— *Remoteness, Appointment Void for—Covenant as to Mode of Execution of special Testamentary Power — Will — Election — Originating Summons—Administration—Costs out of Estate—Costs "as between Solicitor and Client"—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-r.* 29 (*Rules of Supreme Court, January*, 1902, *r.* 10).

In applying the doctrine of election as to taking under or against an instrument, there is no distinction in principle between an appointment which is void because it is in excess of the power and an appointment which is void as transgressing the rule against perpetuity.

A covenant to exercise a special testamentary power in a particular way is void.

W. B. by his will gave property upon trust for the children of A. B. as A. B. should by will appoint, and in default of appointment for the children equally. A. B. covenanted with the trustees of his marriage settlement to exercise the power in a particular way. A. B. by his will made an appointment to his son for life with an appointment over which was void as transgressing the rule against perpetuity, and he also made a bequest of property of his own in favour of the son. The covenant was not satisfied by the terms of the will:—

Held, that the son of A. B. was bound to elect between the interest bequeathed to him in the property of A. B. and his interest in default of appointment under the will of W. B.:

Held, also, that the covenant was void, and therefore could not be enforced against the estate of A. B.

In re Warren's Trusts, (1884) 26 Ch. D. 208, distinguished. *In re* BRADSHAW. BRADSHAW *v.* BRADSHAW - - - **Kekewich J. 436**

4. —— *Special Power — Exercise by Will—Settled Land—Lease by Appointor after Exercise of Power by Will—Lease in Consideration of Premium—Operation of Appointment on Premium—Ademption—"Capital Money"—Change of Investment—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 23, 24, 27—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 4.

A tenant for life of real estate, who had under the settlement power to appoint the estate by will among his children after his own death, made a will by which he appointed part of the estate to one son and part of it to another son. After the execution of the will the testator, in exercise of the power conferred on him as tenant for life by the Settled Land Act, 1882, granted leases of parts of the appointed property in consideration of premiums paid by the lessees. The premiums were paid to the trustees of the settlement, and were invested by them:—

Held, that, neither by virtue of s. 24 of the Wills Act, 1837, nor by virtue of s. 22, sub-s. 5, of the Settled Land Act, 1882, did the appointment carry the premiums to the appointees.

And, there being, in the opinion of the Court, nothing in the will to shew an intention that the premiums should pass under the appointment:—

Held, that the premiums went as in default of appointment under the provisions of the settlement.

Decision of Byrne J. affirmed.

Though an appointment made by will in exercise of a power takes effect under the instrument creating the power, it has no operation until the death of the testator. There is no relation back to the date of the execution of the will.

The doctrine of ademption applies to an appointment by will, whether made under a general or under a special power.

An appointment by will fails in case of the non-existence at the death of the testator of either the object or the subject of the appointment.

Decision of Farwell J. in *In re Dowsett*, [1901] 1 Ch. 398, approved.

Dicta of Lord Cairns in *Cooper* v. *Martin*, (1867) L. R. 3 Ch. at p. 56, approved.

Dicta of Lord St. Leonards, Sugden on Powers, 8th ed. pp. 308, 309, disapproved. *In re* MOSES. BEDDINGTON *v.* BEDDINGTON **C. A. 100**

—— Absolute gift — Power to use capital if income not "sufficient" - - **76**
See WILL. 1.

—— Costs of administering trust fund — Successive appointments of specific sums—Appointment of residue - - **457**
See PRACTICE. 1.

—— Estate duty—Appointed fund—Residue—Testamentary expenses - - **248**
See REVENUE.

POWER OF ATTORNEY—Attorney innocently acting under forged power—Liability of agent—Third party—Indemnity **610**
See PRINCIPAL AND AGENT. 1.

—— Borrowing by agent — Misappropriation—Excess of authority—Liability - **816**
See PRINCIPAL AND AGENT. 2.

POWER OF SALE—Implied—Shares in company—Notice to mortgagor - - **579**
See MORTGAGE. 4.

PRACTICE — *Appeal — Order whether Final or Interlocutory—Solicitor—Summons for delivery of Bill of Costs and Taxation — Order dismissing Summons—Rules of Supreme Court*, 1883, *Order* LVIII., *rr.* 3, 9, 15.

An order dismissing an originating summons for delivery of a bill of costs by a solicitor and taxation is a final order, and an appeal from it should be treated as a final, not an interlocutory, appeal. *In re* HERBERT REEVES & Co. **C. A. 29**

2. —— *Costs — Administration Action—Real and Personal Estate — Apportionment — Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, *sub-s.* 1, 2, *sub-s.* 3.

The settled practice of the Chancery Division, as stated in *In re Middleton*, (1882) 19 Ch. D. 552, that the costs of an administration action so

PRACTICE—*continued.*

far as they have been increased by the administration of the real estate, are to be borne by that real estate, has not been altered or affected by the Land Transfer Act, 1897. *In re* JONES. ELGOOD *v.* KINDERLEY. ELGOOD *v.* JONES
Buckley J. 92

3. —— *Costs—Compulsory Purchase of Land by Public Body—Wilful Neglect of Vendor to make out Good Title—Payment of Purchase-money into Court—Costs of Petition for Payment out—Discretion of Court—Refusal of Vendor to give Possession—Warrant to Sheriff—Sheriff's Costs—"Deduction" from Purchase-money — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 80, 91—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

Notwithstanding that in s. 80 of the Lands Clauses Consolidation Act, 1845, certain cases are excepted from the power thereby given to the Court to order costs to be paid by the promoters of an undertaking when money has been deposited in court, the Court has now, by virtue of s. 5 of the Supreme Court of Judicature Act, 1890, a discretionary power to order payment of costs in the excepted cases.

The sheriff's costs of a warrant to give possession of land, incurred after payment of the purchase-money into court by the promoters, were ordered to be paid out of the fund in court. *In re* SCHMARR - - - - **C. A. 326**

4. —— *Costs—Power of Appointment—Successive Appointments of Specific Sums—Appointment of Residue—Costs of administering Trust Fund—Estate Duty.*

A husband and wife, in exercise of a joint power of appointment over a trust fund (subject to their respective life estates therein) amongst the children of the marriage, appointed three sums of 10,000*l.* in trust for their three elder daughters, and appointed the residue, after satisfying the three previous appointments, in trust for their fourth daughter, but so that the appointment should not exceed 10,000*l.* The fund was not sufficient to provide for the appointment of the full sum of 10,000*l.* to the fourth daughter. Upon the distribution of the fund;—

Held, applying the rule laid down by Chitty L.J. in *In re Saunders*, [1898] 1 Ch. 17, 23, that the general costs of administering the trust fund, including the costs of raising the estate duty payable on the respective deaths of the husband and wife and the costs of raising the appointed sums, ought to be borne rateably by the four appointed sums. *In re* CHISHOLM. GODDARD *v.* BRODIE - - - - **Kekewich J. 457**

5. —— *Originating Summons—Construction of "Written Instrument"—Company—Articles of Association—Questions affecting Class of Shareholders—Preference Shares—Rules of Supreme Court*, 1883, *XVI., r.* 32 (*b*); *Order LIV. A, rr.* 1, 2.

A company proposing to issue new preference shares ranking pari passu with its existing preference shares served on one of its preference shareholders (sued on behalf of himself and the other preference shareholders) an originating summons for the determination of certain questions, with reference to the proposed issue, arising on the construction of the articles of association.

PRACTICE—*continued.*

Buckley J. refused to appoint the defendant to represent the class, and said that he would not decide the questions so as to bind the class of preference shareholders unless a meeting of them was first called and nominated a person to represent them, in which case he would appoint him to represent the class. He, however, decided the question as between the company and the defendant. MORGAN'S BREWERY COMPANY *v.* CROSSKILL.
Buckley J. 898

6. —— *Parties — Adding Defendant — Joint and Several Liability of Trustees—Action against one Trustee only—Application to join Co-trustee for purpose of Contribution—Rules of Supreme Court*, 1883, *Order XVI., r.* 11.

G. and C. were the trustees of a settlement. C. died, and X., his legal personal representative, lived in Ireland. M., the cestui que trust, brought an action against G., alleging a breach of trust by him and C., and claiming payment by G. of the amount lost by the breach. A third-party notice, by which G. claimed contribution from the estate of C., and the order giving leave to serve it on X. in Ireland, were set aside by the Court of Appeal without prejudice to an application by G., under Order XVI., r. 11, to add X. as a defendant to the action: *McCheane* v. *Gyles*, [1902] 1 Ch. 287.

On the application to add X. being made, it was opposed by the plaintiff:—

Held, that X. ought not to be added as a defendant against the plaintiff's wish.

Dix v. *Great Western Ry. Co.*, (1886) 34 W. R. 712, and *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q. B. 321, distinguished. MCCHEANE *v.* GYLES (No. 2) - - - **Buckley J. 911**

7. —— *Service—Procedure—Action for Breach of Trust—Relief claimed by Defendant—Contribution—Third-party Notice—Third Party out of Jurisdiction—"Necessary or Proper Party"—Service out of Jurisdiction—Service in Ireland—Application for Leave—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Supreme Court*, 1883, *Order XI., rr.* 1 (*g*), 2; *Order XVI., rr.* 11, 48.

The third-party procedure, which is the creature of the Judicature Act, 1873, s. 24, sub-s. 3, is governed, as regards service out of the jurisdiction of a third-party notice issued by a defendant under Rules of the Supreme Court, 1883, Order XVI., r. 48, by Order XI., r. 1; so that a defendant can only obtain leave to serve such a notice on a third party out of the jurisdiction when the subject-matter of his claim falls under one or other of the specific cases mentioned in Order XI., r. 1, in which service of a writ out of the jurisdiction will be allowed.

Thus where, in an action by a cestui que trust against the survivor of two trustees for breach of trust, the defendant applied under Order XI., r. 1 (*g*), for leave to serve the legal personal representative, resident in Ireland, of the deceased trustee, as being "a necessary or proper party" to the action, with a third-party notice issued under Order XVI., r. 48, and claiming contribution:—

Held, by the Court of Appeal, that Order XI., r. 1 (*g*), had no application to a third-party

PRACTICE—*continued.*
notice for contribution (unless, *semble*, there were at least two contributors one of whom was within the jurisdiction); and that contribution from a single contributor was not one of the cases mentioned in that order in which service of a writ out of the jurisdiction could be allowed. An order made by Buckley J., giving the defendant leave to serve his notice on the third party in Ireland, was therefore discharged, but without prejudice to any application by him under Order XVI., r. 11, to add the third party as a defendant to the action. McCHEANE *v.* GYLES C. A. 287

8. —— *Summons for Directions—Notice of Application to Master—Interlocutory Matter—Order in Chambers dismissing Action—Jurisdiction—Rules of Supreme Court, Order XXX., rr.* 1, 2, 4, 5.

Where a summons for directions has been issued under Order XXX., r. 1, there is jurisdiction, upon an application by a defendant in chambers for further directions on notice under rule 5, to strike out a statement of claim on the ground that it discloses no reasonable cause of action, and to dismiss the action with costs as frivolous and vexatious. An application of this nature is an interlocutory matter within rule 5, which is not controlled or limited by rule 2 to the matters therein particularly enumerated PEPPERELL *v.* HIRD - - Byrne J. 477

—— Payment out of court — French subject entitled—Conflict of laws—"Prodigal" *See* CONFLICT OF LAWS. 2. 488

—— Public-house—Licences in jeopardy—Recovery of possession—Disputed title 386
See RECEIVER.

PREFERENCE—Tolls—Equality—Undue preference—Ultra vires - - 369
See RAILWAY. 2.

PREMIUM—Lease in consideration of—Operation of appointment on premium 100
See POWER OF APPOINTMENT. 4.

PRESCRIPTION—*Lost Grant, Presumption of—Inclosure Act—Award—Drainage, Preservation of—Restriction of Pasturage on Road to Sheep—Presumption of Legal Origin to support long User.*

A lost grant cannot be presumed where such a grant would have been in contravention of a statute.

By an Act providing for the inclosure of certain commons, and their drainage in connection with that of a larger area in a fen level, as a work of public utility, it was enacted that the herbage on roads to be set out under the Act should belong to the person or persons to whom the Inclosure Commissioners should by their award allot the same, and that in their award the Commissioners should insert such orders, regulations, and determinations, to be observed and followed by the several proprietors, as should be necessary or proper to be inserted therein, for the completing and maintaining of the said drainage and inclosure. By their award the Commissioners awarded that the herbage on certain roads, which adjoined watercourses, should belong to the surveyor of highways, to be by him let annually for the depasturing of sound and and healthy sheep, but of no other cattle or stock whatever. The surveyors of highways had for more than fifty years made a practice of letting the herbage on the roads for the depasturing of a certain number of horses and cattle as well as sheep:—

Held, that, upon the true construction of the Act and award, the prohibition of the pasturage on the roads of stock other than sheep was intended to be a permanent provision: that it was meant, not merely for the protection of the allottees of land under the Act, but also for the preservation of the drainage system in the public interest; that it was therefore not competent for the allottees or any body of persons to make a grant or release in favour of the surveyor of highways, so as to extend the right of pasturage to stock other than sheep; and that consequently a legal origin could not be presumed in order to support the above-mentioned practice of the surveyors of highways.

Decision of Cozens-Hardy J., [1901] 1 Ch. 22, reversed. NEAVERSON *v.* PETERBOROUGH RURAL DISTRICT COUNCIL - - - C. A. 557

—— Ancient lights—"Substantial" interference—Angle of 45 degrees - - - 302
See LIGHT AND AIR.

PRESUMPTION—Legatee entitled to share on surviving testator — Disappearance — No evidence of death - - 723
See WILL. 6.

—— Lost grant — Pasturage — Presumption of legal origin to support long user - 557
See PRESCRIPTION.

—— Lost grant—Right to use of water - 649
See WATER.

—— Policy made payable to another—Purchase in name of a stranger—Presumption of intention - - - - 282
See INSURANCE, LIFE.

—— Subway approaches—Property in subsoil of road ad medium filum - - 269
See LONDON.

PRINCIPAL AND AGENT—*Bank of England—Transfer of Stock—Attorney—Innocent Misrepresentation—Implied Warranty of Authority—Change of Position—Forged Power—Attorney innocently acting under Forged Power—Liability of Agent—Third Party—Indemnity.*

S., a stockbroker, produced to the Bank of England a power of attorney for the sale and transfer of Consols standing in the names of the plaintiff and another person, a solicitor, the form of power having been obtained in ordinary course from the bank by S. upon the instructions of the solicitor, who professed to act on behalf of the plaintiff as well as himself; but the plaintiff knew nothing of the matter. The power purported to be signed by both stockbrokers, and at the foot was the usual "demand to act" signed by S. Acting on that "demand," and in pursuance of their statutory duty, the bank allowed S. to execute the transfer in the bank books as "attorney" for the two stockholders. S. received the purchase-money under the power and paid it to the solicitor, who applied it to his own use

PRINCIPAL AND AGENT—*continued.*

Subsequently it was discovered that the plaintiff's signature to the power had been forged, whereupon, in an action by the plaintiff against the bank, the latter were ordered to transfer to him the like sum of Consols, and also to pay to him all back dividends, together with the costs of the action. The bank then claimed indemnity as against S. under a third-party notice.

No blame was attributable either to S. or to the bank for what had happened:—

Held, that a warranty was to be implied as against S. of the authority upon which he "demanded" of the bank the performance of their statutory duty, and that this implied warranty rendered him liable to indemnify the bank.

The principle laid down in *Collen* v. *Wright*, (1857) 8 E. & B. 647, 657, and the rule deduced therefrom by Lord Esher M.R. in *Firbank's Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54, 60, adopted and applied.

The above cases, and also *Low* v. *Bouverie*, [1891] 3 Ch. 82, discussed.

Decision of Kekewich J., [1901] 1 Ch. 652, affirmed.

The rule in *Collen* v. *Wright*, 8 E. & B. 647, 657, which is left untouched by *Derry* v. *Peek*, (1889) 14 App. Cas. 337, is not limited to a case where the person professing to have authority as an agent purports to make a contract on behalf of his alleged principal. It extends to any case where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having authority. OLIVER *v.* BANK OF ENGLAND - **C. A. 610**

2. —— *Power of Attorney—Construction—General Words—Ejusdem generis—Borrowing by Agent—Representation of Authority—Excess of Authority—Money paid into Banking Account of Principal—Money in Possession of Principal—Money had and received to Use of Principal—Misappropriation by Agent—Liability of Principal to Lender—Conduct—Constructive Notice—Estoppel.*

The plaintiff carried on business as a tobacco merchant in Melbourne, Australia, under a firm name. He also had a London office bearing the firm name, at which the business of purchasing and paying for goods in London and shipping them to Melbourne was carried on. While absent in Australia he appointed an agent at the London office under a power of attorney, describing him (the plaintiff) as of Melbourne trading as a tobacco merchant under the firm name, and authorizing the agent for him (the plaintiff) and in his name, or in his trading name, "to purchase and to make any contract for the purchase of any goods in connection with the business carried on by me as aforesaid," and to make such purchase either for cash or on credit, with power to modify or cancel the contracts for purchase, and "where necessary in connection with any purchase made on my behalf as aforesaid, or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises, and to sign the plaintiff's name or his trading name to any cheques on his banking account in London.

PRINCIPAL AND AGENT—*continued.*

The agent, purporting to act under the power of attorney, obtained a loan of 4000*l.* from the defendants, a firm of cigar merchants in London who had previously had frequent business dealings, including loan transactions, with the plaintiff. On applying for the loan the agent, who was well known to the defendants, represented that the power of attorney authorized him to borrow money, and that the loan was required for the purposes of the plaintiff's business. At the same time he produced to them the power itself, but, being satisfied with his assurances, they did not read it. On receiving the 4000*l.* the agent handed to the defendants as security bills of exchange for the amount accepted in his own name per pro the plaintiff's firm. He then paid the 4000*l.* into the plaintiff's London banking account, drew it out by cheques drawn by him under the power, and applied it to his own use.

The plaintiff, being at that time in Australia, had no knowledge of the loan transaction. In an action by him against the defendants to restrain them from negotiating the bills upon the ground that they had been accepted without his authority, and upon a counter-claim by the defendants against the plaintiff for the 4000*l.* as money had and received by him to their use:—

Held, (1) upon the construction of the power of attorney, that it gave the agent power to purchase only, with such powers as were necessarily implied by the appointment of the agent as purchasing agent, and did not confer authority to borrow; and (2) that the primary cause of the loss of the 4000*l.* was the neglect by the defendants of ordinary business precautions when lending the money to the agent, and that they were therefore estopped by this neglect, and also by constructive notice that the agent had no power to borrow, from claiming it as money had and received by the plaintiff to their use.

Quære, per Vaughan Williams L.J., whether the circumstances were such as to entitle the plaintiff to plead ignorance or absence of means of knowledge of the transaction as constituting by itself a sufficient answer to the defendants' claim as for money had and received.

Marsh v. *Keating*, (1834) 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75, discussed.

Decision of Farwell J., [1901] 1 Ch. 261, affirmed. JACOBS *v.* MORRIS - - **C. A. 816**

—— Copyright — Infringement—Agent—Estoppel - - - - - **631**
See COPYRIGHT. 2.

PRINCIPAL AND SURETY—*Guarantee—Bond to secure Fidelity of Employee—Death of Surety—Notice—Determination of Liability.*

Where a bond is given by a surety for the integrity of a person, in consideration of that person's being appointed to an office by the obligee of the bond, the liability of the surety will not, unless expressly so stipulated in the bond, be determined by his death. *In re* CRACE. BALFOUR *v.* CRACE - - - **Joyce J. 733**

PRIORITY—Shares—Registration—Transfer in blank—Equitable mortgage—Notice
See COMPANY. 12. **522**

PRIVATE INTERNATIONAL LAW—"Mobilia sequuntur personam"—English fund belonging to Austrian who has died without heirs—Right of succession 847
See BONA VACANTIA.

PRIVITY OF CONTRACT—Contract with promoter for benefit of intended company—Ratification—Adoption - - 146
See CONTRACT.

PROBATE—Unattested will—Domiciled foreigner—Leaseholds—Administration with will annexed - - - - 24
See CONFLICT OF LAWS. 1.

"**PRODIGAL**"—Payment out of court—French subject entitled—Conflict of laws 488
See CONFLICT OF LAWS. 2.

PROMOTER—Privity of contract—Company 146
See CONTRACT.

PUBLIC AUTHORITIES PROTECTION—Solicitor and client costs - - - 197
See COSTS.

PUBLIC HEALTH—Sanitary conveniences, Power to provide—Subway approaches—Subsoil of road - - - - 269
See LONDON.

—— Street—Overhead wires - - 866
See LOCAL GOVERNMENT.

PUBLIC-HOUSE—Licences in jeopardy—Recovery of possession—Disputed title 386
See RECEIVER.

PURCHASER—Vendor and.
See Cases under VENDOR AND PURCHASER.

"**PURCHASER**"—Devise to testator's "right heirs"—Co-heiresses—Joint tenancy or co-parcenary - - - 636
See INHERITANCE.

RAILWAY—*Mines—Compulsory Purchase under Special Act—Mine-owner stopped from working Mines within Prescribed Distance—Interest on Compensation Moneys.*

The defendant company was the owner of a canal, and the plaintiffs were the owners of mines under the canal and the adjacent land. Under the provisions of a private Act passed in 1892, when the workings of a mine-owner in the position of the plaintiffs approached within a prescribed distance of the canal he was to give a two months' notice to the company of his intention to proceed with the work, and within the two months was not to continue working within the prescribed distance. If the company considered that the further working was likely to damage the canal and was willing to purchase and make compensation for the seam, it could give a counter-notice to that effect, and then the seam was not to be wrought or gotten, but was to be purchased and paid for by the company, the amount, if not agreed upon, being settled by arbitration.

The mine-owners' notice having been given, the company's counter-notice was given on November 19, 1892. An arbitrator was appointed in November, 1897, and it was subsequently

RAILWAY—*continued.*

agreed that all questions between the parties should be left to the arbitrator and that his decision should be accepted without dispute, except that on the question of interest on the amount found due for purchase-money and compensation either party might obtain the decision of a Court of law.

The arbitrator awarded 16,566*l.* for purchase-money and compensation, on the footing of the plaintiffs' seam having been purchased on November 19, 1892, and that interest at 4 per cent. on the amount should be calculated from that date until the date of payment:—

Held, that when the company gave its notice to the mine-owners, the latter were by force of the statute prevented from enjoying the minerals in their way—namely, by working them—and the company thenceforth obtained the enjoyment in its way—namely, by way of support—and became liable to pay the purchase-money; that from that time the mine-owners had been deprived of their property, and the company had enjoyed both that and the purchase-money, and that on the principle laid down in *Birch* v. *Joy*, (1852) 3 H. L. C. 565, with reference to ordinary vendors and purchasers, the mine-owners were entitled to the interest as awarded.

Caledonian Ry. Co. v. *Carmichael*, (1870) L. R. 2 H. L., Sc. 56, distinguished. FLETCHER *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY Buckley J. 901

2. —— *Tolls—Equality—Undue Preference—Ultra Vires—Shareholder—Action by Shareholder against Railway Company and Preferred Customer—Railways Clauses Act*, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 90—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2.

If a railway company carries goods for a customer at a lower rate than that charged to other customers, it may be an undue preference and give to other customers a right to complain before the Railway and Canal Commissioners, but it is not an act ultra vires the company, and it gives no right to a shareholder of the company to bring an action against the company and the preferred customer for an account and an order that the preferred customer should make good the deficiency, or for an injunction to restrain further preferences. ANDERSON *v.* MIDLAND RAILWAY COMPANY - - - Buckley J. 369

REAL ESTATE CHARGES—Collective devise of real estates—Aggregation of charges—Exoneration of personal estate - 203
See WILL. 3.

REAL PROPERTY LIMITATION ACT—Breach of trust—"Action to which no existing Statute of Limitations applies" - 176
See TRUSTEE. 3.

—— Action to recover land—Person under disability—Claim by husband in right of wife - - - - - 512
See LIMITATIONS, STATUTE OF.

RECEIVER—*Practice—Public-house—Licences in Jeopardy—Recovery of Possession—Disputed Title—Receiver of Licences and of Rents and Profits—Landlord and Tenant—Breach of Covenant—*

RECEIVER—*continued.*

Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14.

The defendant was tenant of a public-house under an agreement, dated in 1893, whereby the plaintiffs agreed to let and the defendant to take the premises for one year certain. Under the agreement the defendant was not to do, or cause or suffer to be done, any act, deed, or thing whereby the licences might be jeopardized, suspended, forfeited, or lost; he was, upon quitting the premises, to assign over the licences to the plaintiffs; and he was to reside on the premises, and not to shut them up, or cause or suffer the same to be shut up, or the trading thereon to be suspended. It was thereby also agreed that if the tenant should commit any breach of the agreement, or the licences should be jeopardized, the tenancy should cease, and the landlords should have power at once, without notice or legal proceedings, to re-enter upon the premises and resume possession thereof. The defendant continued tenant upon the terms of the agreement until November, 1901, when he closed the house and went away.

In an action for recovery of possession and for a receiver, the Court appointed a receiver of the licences and of the rents and profits, ordered the licences to be handed over to the receiver, and gave him possession of the premises so far as was necessary for the purposes of preserving the licences. CHARRINGTON & Co. *v.* CAMP

Joyce J. 386

—— Electric lighting company—Default in payment by customer—Power to cut off current—Change of occupancy - **411**
See ELECTRIC LIGHT.

RECTIFICATION—Register—Company practice
See COMPANY. 10. **467**

REDEMPTION—Mortgages.
See Cases under MORTGAGE.

REDUCTION OF CAPITAL—Scheme—Illegality—Nominal reduction—Actual increase—Issue of capital at a discount - **547**
See COMPANY. 8.

REGISTRATION—Conditions annexed to title—Building restrictions — Modification — Consent - - - - **674**
See LAND TRANSFER.

—— Debenture—Extending time — Application after commencement of winding-up **695**
See COMPANY. 2.

—— Debentures—Extension of time—Protection of creditors - - - - **79**
See COMPANY. 3.

—— Debentures—Extension of time—Protection of creditors—Winding-up - - **396**
See COMPANY. 4.

—— "Invented word"—Non-descriptive word
See TRADE-MARK. **783**

—— Rectification—Company practice - **467**
See COMPANY. 10.

—— Shares — Transfer in blank — Equitable mortgage—Notice—Priority - **522**
See COMPANY. 12.

REGISTRATION—*continued.*

—— Trade-mark — Combination of devices — Essential particulars - - **758**
See TRADE-MARK. 1.

—— Trade-mark—"Distinctive word"—"Addition" to trade-mark - - **125**
See TRADE-MARK. 2.

REMAINDERMAN—Tenant for life and.
See under SETTLED LAND.

REMOTENESS—Will — Election—Appointment void for remoteness - - **436**
See POWER OF APPOINTMENT. 3.

REMUNERATION—Appointment by Court of some of directors as remunerated receivers and managers - - **701**
See COMPANY. 5.

RENT—"Best rent" — Collusive bargain for reduction of rent - - - **599**
See SETTLED LAND. 9.

—— Vendor in occupation of land sold—Wilful default — Occupation rent — Farming losses - - - - **226**
See VENDOR AND PURCHASER. 2.

REPAIRS — Mansion-house — Dilapidations — Salvage—Expenditure out of capital—Jurisdiction - - - - **15**
See WILL. 7.

RESCISSION—Lien for deposit—Power to purchaser to rescind in given event - **835**
See VENDOR AND PURCHASER. 3.

RESIDENCE—Tenant for life—Forfeiture clause—Non-residence—Validity of condition
See SETTLED LAND. 6. **378**

RESIDUE—Charitable legacy—General or limited charitable purposes — Admissibility of evidence - - - - **214**
See CHARITY. 1.

—— Gift of residue to individuals in shares—Gift of income for maintenance of all—Vested or contingent - - **945**
See WILL. 10.

RESTRAINT OF TRADE — *Covenant — "Interested" in similar Business—Servant—Fixed Salary.*

A covenant not to become directly or indirectly "interested" in a similar business to that of the covenantee does not prevent the covenantor from becoming a servant at a fixed salary in a similar business.

Smith v. *Hancock*, [1894] 2 Ch. 377, applied.
GOPHIR DIAMOND COMPANY *v.* WOOD

Swinfen Eady J. 950

RESTRAINT ON ANTICIPATION—Rule against perpetuities—Severance of class - **543**
See HUSBAND AND WIFE.

RESULTING TRUST—Policy made payable to another—Purchase in name of a stranger—Presumption of intention - **282**
See INSURANCE, LIFE.

RETIREMENT—Trustee for sale—Sale to ex-trustee twelve years after his retirement
See VENDOR AND PURCHASER. 5. **244**

REVENUE—*Estate Duty—Incidence—Exercise of General Power of Appointment by Will—Appointed*

REVENUE—*continued.*

Fund—Residue—Testamentary Expenses—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 6, *sub-s.* 2; *s.* 7, *sub-ss.* 6, 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 22.

Where a general power of appointment over a reversionary interest in a fund expectant upon the determination of a life interest in the testator and of a subsequent life interest in a person who survives him is exercised by will, the corpus of the fund is, under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, property which passes on the testator's death, and estate duty is payable on that corpus under s. 8, sub-s. 4, by the person to whom the property passes for a beneficial interest in possession, or by the trustees in whom the fund is vested. It is not payable by the executors of the will, and is consequently not a testamentary expense. In these circumstances the question whether the fund passed to the "executors as such" within s. 9, sub-s. 1, does not arise. *In re* DIXON. PENFOLD *v.* DIXON
Buckley J. 248

—— Estate duty—Costs of administering trust fund - - - - - 457
See PRACTICE. 4.

RIPARIAN OWNER—Conservators—Navigation—Dredging - - - - 163
See THAMES.

RIPARIAN PROPRIETORS — Artificial watercourse—Right to use of water—Nature of presumed lost grant - - 649
See WATER.

ROAD—Subway approaches—Property in subsoil of road ad medium filum—Presumption
See LONDON. 269

—— Turnpike trustees—Road originally conveyed in fee—Vesting in urban authority—Overhead wires. - - 866
See LOCAL GOVERNMENT.

RULES OF SUPREME COURT:—**Order XI.**, rr. 1 (g), 2— *Service out of Jurisdiction*
See PRACTICE. 7. 287

—— **Order XVI., rr. 11, 48**—*Parties* - 287
See PRACTICE. 7.

—— —— **r. 11**—*Parties* - - - 911
See PRACTICE. 6.

—— —— **r. 32 (b)**—*Parties* - - 898
See PRACTICE. 5.

—— **Order XXII., rr. 6, 7**—*Payment into and out of Court and Tender* - - 197
See COSTS.

—— **Order XXVI., r. 1**—*Discontinuance* - 197
See COSTS.

—— **Order XXX., rr. 1, 2, 4, 5**—*Summons for Directions* - - - - 477
See PRACTICE. 8.

—— **Order LIV. A, rr. 1, 2** — *Declaration on Originating Summons* - - 898
See PRACTICE. 5.

—— **Order LVIII., rr. 3, 9, 15** - - 29
See PRACTICE. 1.

—— **Order LXV., r. 27, sub-r. 29**—*Costs—Rules of Supreme Court, January*, 1902, *r.* 10
See POWER OF APPOINTMENT. 3. 436

SALE — Clog on redemption — Agreement subsequent to mortgage—Option to purchase—Conditional sale - - 53
See MORTGAGE. 1.

—— Implied power of sale—Shares in company—Notice to mortgagor - - 579
See MORTGAGE. 4.

—— Trust for sale—Right of trustees to retain land unsold - - - - 841
See CHARITY. 2.

—— Vendor and purchaser.
See Cases under VENDOR AND PURCHASER.

SALVAGE — Mansion-house — Dilapidations — Repairs—Expenditure out of capital—Jurisdiction - - - - 15
See WILL. 7.

SANITARY CONVENIENCES—Power to provide—Subway approaches—Subsoil of road
See LONDON. 269

SAVINGS BANK — Deposit-book — Evidence — Delivery - - - - 680
See DONATIO MORTIS CAUSÂ. 1.

SECRET TRUST — Absolute gift — Charity — Trust for benefit of public, but so that they should acquire no rights - 403
See WILL. 2.

SEPARATION — Judicial — After-acquired property — Covenant — "During the marriage" - - - - 82
See SETTLEMENT. 1.

SERVANT—Covenant—"Interested" in similar business—Fixed salary - - 950
See RESTRAINT OF TRADE.

SERVICE — Out of jurisdiction — Third-party notice—"Necessary or proper party"
See PRACTICE. 7. 287

SETTLED LAND—*Capital Money—Improvements—Income or Capital chargeable—Leaseholds held on Trust to Pay Rents and perform Lessees' Covenants and subject thereto for Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 15.

Properties, the leases of which contained covenants by the lessees to do works which would be repairs and improvements within the meaning of the Settled Land Acts, were bequeathed to trustees upon trust out of the rents and profits to pay the rents reserved by the leases and perform the lessees' covenants, and subject thereto upon trusts under which K. was tenant for life, with remainders to other persons.

Without any scheme being submitted under s. 26 of the Settled Land Act, 1882, money was expended in making improvements:—

Held, that as there was a trust, providing for improvements out of income, and that trust came before the trust for K., the expenses must be borne by income.

Clarke v. *Thornton*, (1887) 35 Ch. D. 307, and *In re Lord Stamford's Settled Estates*, (1889) 43 Ch. D. 84, distinguished.

Held, further, following *Countess of Cardigan* v. *Curzon-Howe*, (1893) 9 Times L. R. 244, that even if the Court had power to direct payment for the improvements out of capital, as no scheme had been submitted the power could only be

SETTLED LAND—*continued.*

exercised under s. 15 of the Settled Land Act, 1890, and that under that section there was a discretion which ought not to be exercised in favour of K. *In re* PARTINGTON. REIGH *v.* KANE
Buckley J. 711

2. —— *Capital Money, Application of—Leasehold Houses—Alterations and Additions with a view to Letting—Electric Lighting Installation—Tenant for Life and Remainderman—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*ii.*).

Leasehold houses in a fashionable quarter of London were comprised in a settlement. They were more than fifty years old, and were lighted by an imperfect service of gas. In order to satisfy the modern requirements of tenants it was necessary to provide a system of electric lighting for the houses:—

Held, that the provision of an electric lighting installation, exclusive of fittings such as would be ordinarily supplied by a tenant, was an "addition" within the meaning of s. 13, sub-s. (ii.), of the Settled Land Act, 1890, and might properly be paid for out of capital money. *In re* FREAKE'S SETTLEMENT. KINNAIRD *v.* FREAKE
Joyce J. 97

3. —— *Capital or Income—Fine on Surrender of Lease—Tenant for Life and Remainderman.*

In the absence of mala fides, money paid to a legal life tenant as the consideration for accepting the surrender of a lease, granted without recourse to the powers of the Settled Land Acts, belongs to him as a casual profit. *In re* HUNLOKE'S SETTLED ESTATES. FITZROY *v.* HUNLOKE - - - **Swinfen Eady J. 941**

4. —— *Capital or Income—Fine on Surrender of Lease—Tenant for Life and Remainderman.*

Lands were devised in trust for sale subject to an agreement for a building lease, so that the equitable life tenants could only accept a surrender on obtaining the leave of the Court to exercise the powers of the Settled Land Acts. The old tenants having failed to build, a conditional contract was entered into by which it was agreed, subject to the approval and leave of the Court being obtained under s. 7 of the Settled Land Act, 1884, that the life tenants should accept a surrender and should grant a similar agreement for a building lease to a new tenant for the rest of the term at a peppercorn rent for the first one and a half years, and afterwards at the old rent, the old tenants undertaking to pay the trustees the amount of the one and a half year's rent in advance to be applied as income in order to make up the loss of rent during the peppercorn period.

North J. having varied the contract by directing the amount of the one and a half year's rent paid in advance to be treated as capital, approved it as so varied, and gave the required leave. *In re* GUTHRIE'S SETTLED ESTATES
North J. 942, n.

5. —— *Conflict between Provisions of Will and Provisions of Act — Consents necessary to exercise of Power by Trustees of Will—Undivided Shares—Several Persons constituting Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 56, *sub-s.* 2—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6, *sub-s.* 2.

Where by a will a power of sale was given to the trustees of the whole estate, but undivided shares were separately settled:—

Held, that there was a conflict, within the meaning of s. 56, sub-s. 2, of the Settled Land Act, 1882, between the provisions of the will and the provisions of the Act; that the tenants for life of undivided shares did not together constitute, within the meaning of s. 6, sub-s. 2, of the Settled Land Act, 1884, a tenant for life for the purposes of the Act of 1882, and that therefore the consents of all the persons who were tenants for life, or persons having the powers of tenants for life, of the undivided shares were necessary to the exercise of their power of sale by the trustees of the will. *In re* OSBORNE AND BRIGHT'S, LIMITED - - **Kekewich J. 335**

6. —— *Forfeiture Clause—Tenant for Life—Non-residence—Validity of Condition—Compromise — Sale of Tenant for Life's Interests — Investment—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50, *sub-s.* 1; *s.* 51, *sub-s.* 1.

The testator gave his wife the use of his residence, Woodville, so long as she should desire to make it her permanent place of residence, and should remain his widow, and directed that his estate should pay all rates, taxes, and outgoings in respect of the house and keep it in repair. He left his residuary real and personal estate upon trust for sale and conversion, and then for his children and their issue; the income of the shares of daughters to be paid to them during coverture without anticipation, and the capital of those shares to be divided after the daughters' deaths amongst their children. He directed his trustees to postpone the sale of Woodville, and to develop it as they thought fit. Byrne J. decided that the widow had the powers of a tenant for life under the Settled Land Act, 1882, and would not forfeit the benefits given by the will if she sold or leased the property. It was now proposed that she and the trustees should enter into a compromise whereby she should release to them her claims in respect of Woodville in consideration of an annual payment of 275*l.* during widowhood—a sum less than the estimated value of her interests under the will:—

Held, that, under s. 51, sub-s. 1, of the Settled Land Act, 1882, the condition as to residence was void only so far as it tended to prevent the exercise of the powers of the tenant for life; that there was nothing to prevent the widow from releasing her beneficial interests in the manner proposed; that if she did so she would forfeit those interests by ceasing to reside, but would receive the value of them in the shape of the annuity of 275*l.*; that no question of improper investment arose, as the real result of the transaction would be to relieve the testator's estate from part of the payments to which it was subject; and that the compromise was for the benefit of all parties, was within the power of the trustees, and ought to be sanctioned.

In re Haynes, (1887) 37 Ch. D. 306, followed. *In re* TRENCHARD. TRENCHARD *v.* TRENCHARD
Buckley J. 378

SETTLED LAND—*continued.*

7. —— *Future Trust for Sale—Trustees for Purposes of Settled Land Acts—Tenant for Life Trustee — Vendor and Purchaser—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 8—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 16, *sub-s. ii.*

A tenant for life of settled land which is subject to a trust for sale exercisable after his death can be a trustee of the settlement for the purposes of the Settled Land Acts.

Testator gave his wife a life interest in an estate, and appointed her and another trustees of the estate with a trust for sale exercisable after her death :—

Held, that they were trustees for the purposes of the Settled Land Acts. *In re* JACKSON'S SETTLED ESTATE - - **Buckley J. 258**

8. —— *Infant Tenant for Life — Possession during Minority—Guardian—Trustee*—12 *Car.* 2, *c.* 24, *s.* 9—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 42—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 60.

Under s. 60 of the Settled Land Act, 1882, the trustees appointed for the purposes of the Act may, in the event of the tenant for life being an infant, exercise the powers vested in him by the Act for his benefit during his minority :—

Held, that this provision did not constitute the trustees trustees with power of sale of the settled land under s. 42 of the Conveyancing and Law of Property Act, 1881, so as to entitle them to possession during the minority of the infant, and afforded no answer to an application by the testamentary guardian under 12 Car. 2, c. 24, for possession. *In re* HELYAR. HELYAR *v.* BECKETT **Joyce J. 391**

9. —— *Lease — Void or Voidable — "Best Rent"—Collusive Bargain for Reduction of Rent —Purchaser for Value without Notice—Doubtful Title—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 7, *sub-s.* 2 ; *s.* 54.

A tenant for life, purporting to act under the powers of the Settled Land Act, 1882, granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, and the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, and the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, and the purchaser objected that, having regard to the amount of the price, it must be shewn that the rent reserved by the lease was the best that could reasonably be obtained within s. 7, sub-s. 2, of the Settled Land Act. The vendor had no knowledge of the arrangement between the lessor and the lessee as to the reduction of the rent, and he insisted that, as purchaser for value without notice, he could make a good title to the purchaser :—

Held, by Buckley J., that, inasmuch as the lease did not comply with the statutory requirements as to rent, and the lessee did not act in good faith within s. 54, it was bad, and could be set aside as against a purchaser for value without notice :

SETTLED LAND—*continued.*

Held, by the Court of Appeal, on the authority of *Freer* v. *Hesse*, (1853) 4 D. M. & G. 495, that, assuming that the lease was voidable only and not void, the title was not such as ought to be forced upon the purchaser, since it depended on a doubtful question of fact, namely, whether his predecessor in title, the vendor, purchased without notice of the defect in the title. *In re* HANDMAN AND WILCOX'S CONTRACT - **C. A. 599**

10. —— *Mortgage to discharge Incumbrances —"Required"—Tenant for Life—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

The word "required" in s. 11 of the Settled Land Act, 1890, is not confined to cases where a mortgagee has given notice to call in his money ; the section must be read as if "required" meant "where money is reasonably required having regard to the circumstances of the settled land." *In re* CLIFFORD. SCOTT *v.* CLIFFORD **Buckley J. 87**

—— Lease in consideration of premium—Ademption—"Capital money" - - **100**
See POWER OF APPOINTMENT. 4.

—— Mansion-house—Dilapidations—Salvage—Repairs—Expenditure out of capital—Jurisdiction - - - - **15**
See WILL. 7.

—— Several estates comprised in same devise—Interest on charges - - **347**
See SETTLEMENT. 2.

SETTLEMENT — *After-acquired Property — Covenant — "During the Marriage"—Judicial Separation—Property acquired during Separation —Husband and Wife—Construction of Settlement —Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 25 — *Matrimonial Causes Act*, 1858 (21 & 22 *Vict. c.* 108), *s.* 8.

A marriage settlement contained a covenant to settle all property to which the wife then was or she or her husband in her right should, during the said intended marriage, become beneficially entitled in possession or reversion. A judicial separation was subsequently decreed between the husband and wife. At the date of the settlement the wife was entitled to a reversionary interest, which fell into possession during the separation ; and she became entitled during the separation to some personal property under the will of her mother :—

Held, that the reversionary interest was bound by the covenant ; but that the property acquired during the separation was not bound, because the object of the covenant was to exclude the husband, and, inasmuch as he was excluded by s. 25 of the Matrimonial Causes Act, 1857, the covenant was inoperative during the separation. DAVENPORT *v.* MARSHALL **Buckley J. 82**

2. —— *Several Estates comprised in same Devise—Tenant for Life—Remaindermen—Interest on Charges—Current Rents and Profits—Insufficiency—Arrears of Interest—Subsequent Rents—Payment off of Charges.*

Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of

SETTLEMENT—*continued.*

the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life are applicable to liquidate arrears accruing during the same life tenancy: *Revel* v. *Watkinson*, (1748) 1 Ves. Sen. 93; *Tracy* v. *Viscountess of Hereford*, (1786) 2 Bro. C. C. 128; *Caulfield* v. *Maguire*, (1845) 2 J. & Lat. 141.

Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates: *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *In re Hotchkys*, (1886) 32 Ch. D. 408.

Upon principle, therefore, a tenant for life of several estates included in the same devise is liable, as between himself and the remaindermen, to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property. HONYWOOD *v.* HONYWOOD
Byrne J. 347

SEVERANCE — Class — Married woman — Restraint on anticipation - - 543
See HUSBAND AND WIFE.

SHAREHOLDERS AND SHARES.
See under COMPANY.

SHERIFF—Costs—"Deduction" from purchase-money—Lands Clauses Act - 326
See PRACTICE. 3.

SHELLEY'S CASE—Rule in—"Issue"—Estate in special tail - - - 34
See WILL. 5.

SOLICITOR — *Costs — Taxation — Commission — Surcharge—Solicitor and Client Disclosure—Duty to advise—Bargain with Client.*

Solicitors who were retained by O. to act for him in negotiating the purchase of a patent had previously obtained from the vendor of the patent a commission note under which they were to receive certain payments in the event of a purchaser being found by them: this note was shewn to O. by the solicitors and remained in his possession some days previously to the contract for sale being entered into. O. purchased the patent, and the solicitors with his knowledge recovered payment from the vendor of 210*l.* for commission. O. died, and the solicitors delivered their bill of costs to his executors, who on taxation sought to surcharge the solicitors with the 210*l.* so received by them: the taxing master allowed the surcharge. On a summons to review this finding:—

Held, affirming the decision of Kekewich J., that O.'s executors were not entitled to treat the 210*l.* paid by the vendor to the solicitors as money received to O.'s use, or in any way to surcharge them; that the rule applied in *O'Brien* v. *Lewis*, (1863) 32 L. J. (Ch.) 569, did not govern the present case, as the commission was paid, not by the client, but by the vendor; but that the solicitors had made a bargain which was not merely improper, but such as to place them in a position in which it was impossible for them to fulfil the duties which they had undertaken

SOLICITOR—*continued.*

to both vendor and purchaser of the patent. *In re* HASLAM & HIER-EVANS - - C. A. 765

2. —— *Costs—Taxation—Solicitor-Mortgagee—Negotiation Fee—Mortgagees Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 2—*General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *Sched. I., Part I., r.* 11.

Property belonging to D. was in mortgage. N., a solicitor, arranged that the mortgage should be paid off, that the property should be reconveyed to D., and that N. should lend his own money to D. on mortgage of the same property; and this was done. N. had not a partner with him in his business as a solicitor:—

Held, that N. was entitled to charge the scale fee for negotiating the loan. *In re* NORRIS
Swinfen Eady J. 741

—— Appeal—Order whether final or interlocutory—Summons for taxation - 29
See PRACTICE.

—— Costs—Mortgagee's costs—Costs of negotiating loan and preparing mortgage deed.
See MORTGAGE. 2. 860

—— Costs—Public authorities protection—Solicitor and client costs - - - 197
See COSTS.

SPECIFIC PERFORMANCE—Conditions of sale—Interest on purchase-money—Wilful default - - - - 226
See VENDOR AND PURCHASER. 2.

STATUTE—Construction—Advowson—Patron—Infant — Trustees to present during minority—Guardian - - 400
See ECCLESIASTICAL LAW.

STATUTES:—

12 Car. 2, c. 24, s. 9—*Guardians* - 391
See SETTLED LAND. 8.

22 & 23 Car. 2, c. 10, s. 5—*Distributions* 218
See DISTRIBUTIONS, STATUTE OF.

3 Geo. 4, c. 126—*Turnpike Roads* - 866
See LOCAL GOVERNMENT.

3 & 4 Will. 4, c. 27, ss. 16, 17, 34—*Real Property Limitation* - - - 512
See LIMITATIONS, STATUTE OF.

3 & 4 Will. 4, c. 106, s. 3—*Inheritance* - 636
See INHERITANCE.

5 & 6 Will. 4, c. 54, s. 2—*Marriage* - 751
See CONFLICT OF LAWS. 3.

1 Vict. c. 26, s. 9—*Wills* - - - 24
See CONFLICT OF LAWS. 1.

—— —— ss. 23, 24, 27 - - - 100
See POWER OF APPOINTMENT. 4.

—— —— s. 27 - - - - 314
See POWER OF APPOINTMENT. 2.

5 & 6 Vict. c. 45, s. 15—*Copyright* - 631
See COPYRIGHT. 2.

—— —— s. 18 - - - - 264
See COPYRIGHT. 1.

8 & 9 Vict. c. 18, ss. 80, 91—*Lands Clauses*
See PRACTICE. 3. 326

8 & 9 Vict. c. 20, s. 90—*Railways Clauses* 369
See RAILWAY. 2.

STATUTES—*continued.*

17 & 18 Vict. c. 31, s. 2—*Railway and Canal Traffic* - - - - 369
See RAILWAY. 2.

17 & 18 Vict. c. 113—*Real Estate Charges* 203
See WILL. 3.

20 & 21 Vict. c. 85, s. 25—*Matrimonial Causes*
See SETTLEMENT. 1. 82

21 & 22 Vict. c. 108, s. 8—*Matrimonial Causes*
See SETTLEMENT. 1. 82

25 & 26 Vict. c. 89, ss. 6, 18, 23—*Companies*
See COMPANY. 11. 707

—— —— ss. 25, 30, 35, Sched. I., Table A, clauses, 2, 13 - - - 467
See COMPANY. 10.

30 & 31 Vict. c. 69—*Real Estate Charges* 203
See WILL. 3.

30 & 31 Vict. c. 131, s. 25—*Companies* - 238
See COMPANY. 13.

36 & 37 Vict. c. 66, s. 24, sub-s. 3—*Judicature*
See PRACTICE. 7. 287

37 & 38 Vict. c. 42, ss. 13, 14, 15, 21, 38—*Building Societies* - - - 1
See BUILDING SOCIETY.

37 & 38 Vict. c. 57, ss. 3, 5—*Real Property Limitation* - - - - 512
See LIMITATIONS, STATUTE OF.

—— —— s. 8 - - - - 176
See TRUSTEE. 3.

37 & 38 Vict. c. 62, s. 1—*Infants Relief* 1
See BUILDING SOCIETY.

38 & 39 Vict. c. 55, s. 149—*Public Health* 866
See LOCAL GOVERNMENT.

38 & 39 Vict. c. 60, s. 15, sub-s. 3—*Friendly Societies* - - - - 135
See FRIENDLY SOCIETY.

38 & 39 Vict. c. 87, s. 84—*Land Transfer* 674
See LAND TRANSFER.

40 & 41 Vict. c. 34—*Real Estate Charges* 203
See WILL. 3.

44 & 45 Vict. c. 41, s. 6—*Conveyancing and Law of Property* - - - 926
See EASEMENT.

—— —— s. 14 - - - - 386
See RECEIVER.

—— —— s. 17 - - - - 954
See MORTGAGE. 2.

—— —— ss. 19, 20 - - - 579
See MORTGAGE. 4.

—— —— s. 42 - - - - 391
See SETTLED LAND. 8.

—— —— s. 43, sub-s. 2 - - - 918
See INFANT. 1.

44 & 45 Vict. c. 44, General Order under, Sched. I., Part I., r. 11—*Solicitors' Remuneration* - - - - 741
See SOLICITOR. 2.

45 & 46 Vict. c. 37, s. 3—*Conveyancing* - 428
See VENDOR AND PURCHASER. 4.

45 & 46 Vict. c. 38, s. 2, sub-s. 8—*Settled Land*
See SETTLED LAND. 7. 258

—— —— s. 7, sub-s. 2; s. 54 - - 599
See SETTLED LAND. 9.

STATUTES—*continued.*

45 & 46 Vict. c. 38, s. 22, sub-s. 5 - 100
See POWER OF APPOINTMENT. 4.

—— —— s. 25 - - - - 97
See SETTLED LAND. 2.

—— —— s. 26 - - - - 711
See SETTLED LAND. 1.

—— —— s. 50, sub-s. 1; s. 51, sub-s. 1 378
See SETTLED LAND. 6.

—— —— s. 56, sub-s. 2 - - - 335
See SETTLED LAND. 5.

—— —— s. 60 - - - - 391
See SETTLED LAND. 8.

45 & 46 Vict. c. 61, ss. 48, 49, 50, sub-s. 2 (*b*)—*Bills of Exchange* - - - 507
See COMPANY. 14.

45 & 46 Vict. c. 56, ss. 19, 21—*Electric Lighting* - - - - - 411
See ELECTRIC LIGHT.

46 & 47 Vict. c. 57, ss. 29 sub-ss. 2, 6, 31, 103 sub-ss. 1, 2—*Patents, Designs, and Trade Marks* - - - 494
See PATENT.

—— —— s. 64 - - - - 758
See TRADE-MARK. 1.

—— —— ss. 64, 73, 74 - - - 125
See TRADE-MARK. 2.

47 & 48 Vict. c. 18, s. 4—*Settled Land* - 100
See POWER OF APPOINTMENT. 4.

—— —— s. 6, sub-s. 2 - - - 335
See SETTLED LAND. 5.

51 & 52 Vict. c. 41, ss. 11, 64—*Local Government* - - - - - 866
See LOCAL GOVERNMENT.

51 & 52 Vict. c. 50, s. 10—*Patents, Designs, and Trade Marks* - - 758, 783
See TRADE-MARK. 1, 3.

51 & 52 Vict. c. 59, s. 8—*Trustees* - 176
See TRUSTEE. 3.

52 & 53 Vict. c. clxxviii.—*Electric Lighting Orders Confirmation (No. 2) Act*—Schedule (*London Electric Supply*), clause 47 - - - - 411
See ELECTRIC LIGHT.

53 & 54 Vict. c. 44, s. 5—*Supreme Court of Judicature* - - - - 326
See PRACTICE. 3.

53 & 54 Vict. c. 69, s. 11—*Settled Land* - 87
See SETTLED LAND. 10.

—— —— s. 13, sub-s. (ii.) - - 97
See SETTLED LAND. 2.

—— —— s. 15 - - - - 711
See SETTLED LAND. 1.

—— —— s. 16, sub-s. ii. - - - 258
See SETTLED LAND. 7.

54 & 55 Vict. c. 73, ss. 3, 5—*Mortmain and Charitable Uses* - - - 841
See CHARITY. 2.

54 & 55 Vict. c. 76, s. 44—*Public Health—London* - - - - 269
See LONDON.

56 & 57 Vict. c. 53, s. 16—*Trustees* - 451
See DEED.

STATUTES—*continued.*
56 & 57 Vict. c. 53, s. 25 - - - 692
See TRUSTEE. 4.
56 & 57 Vict. c. 61, s. 1 (*c*)—*Public Authorities Protection* - - - - 197
See COSTS.
57 & 58 Vict. c. 30, ss. 1, 2, 6, sub-s. 2; s. 7, sub-ss. 6, 7; s. 8, sub-s. 4; s. 9, sub-s. 1; s. 22—*Finance Act* - - 248
See REVENUE.
57 & 58 Vict. c. clxxxvii., ss. 83, 87—*Thames Conservancy* - - - 163
See THAMES.
58 & 59 Vict. c. 25, s. 2—*Mortgagees' Legal Costs* - - - - 741
See SOLICITOR. 2.
59 & 60 Vict. c. 25, ss. 56, 57—*Friendly Societies* - - - - - 135
See FRIENDLY SOCIETY.
59 & 60 Vict. c. 35, s. 3—*Judicial Trustees*
See TRUSTEE. 2. 785
60 & 61 Vict. c. 65, ss. 1 sub-s. 1, 2 sub-s. 3—*Land Transfer* - - - 92
See PRACTICE. 2.
—— —— ss. 1, 2 sub-s. 2; 24 sub-s. 2 - 187
See VENDOR AND PURCHASER. 6.
61 & 62 Vict. c. 26, s. 1—*Companies* - 238
See COMPANY. 13.
63 & 64 Vict. c. 48, ss. 14, 15—*Companies* 79
See COMPANY. 3, 4.

STREET — Wires, Overhead — Road originally conveyed in fee — Vesting in urban authority - - - - 866
See LOCAL GOVERNMENT.

SUBSOIL — Subway approaches — Property in subsoil of road ad medium filum — Presumption - - - 269
See LONDON.

SUCCESSION—Right of—English fund belonging to Austrian who has died without heirs —"Mobilia sequuntur personam" 847
See BONA VACANTIA.

SUMMONS FOR DIRECTIONS — Interlocutory matter—Order in chambers dismissing action—Jurisdiction - - 477
See PRACTICE. 8.

SURCHARGE — Commission — Taxation — Disclosure—Duty to advise—Bargain with client - - - - 765
See SOLICITOR. 1.

SURETY—Guarantee—Bond to secure fidelity of employee—Death of surety—Determination of liability - - - 733
See PRINCIPAL AND SURETY.

SURRENDER—Fine on, of lease—Tenant for life and remainderman — Capital or income - - - 941, 942, n.
See SETTLED LAND. 3, 4.

TAXATION—Appeal — Order whether final or interlocutory—Solicitor — Summons for taxation - - - - 29
See PRACTICE. 1.

TAXATION—*continued.*
—— Commission—Surcharge—Disclosure—Duty to advise—Bargain with client - 765
See SOLICITOR. 1.
—— Costs — Solicitor-mortgagee — Negotiation fee - - - - - 741
See SOLICITOR. 2.

TENANCY—Notice by—Adverse title—Constructive notice - - - - 428
See VENDOR AND PURCHASER. 4.

TENANT FOR LIFE.
See under SETTLED LAND.
—— Absolute gift—Power to use capital if income not "sufficient"—Power of appointment - - - - 76
See WILL. 1.

TESTAMENTARY EXPENSES—Estate duty—Appointed fund—Residue - 248
See REVENUE.

THAMES—*Conservators—Navigation — Dredging — Riparian Owner — Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 83, 87.
The Thames Conservators have no power under the Thames Conservancy Act, 1894, to grant a licence to dredge the upper Thames upon the terms that the licensee may sell the soil so raised for his own benefit. PALMER *v.* THAMES CONSERVATORS - - - **Kekewich J. 163**

THIRD PARTY — Attorney innocently acting under forged power—Liability of agent —Indemnity - - - 610
See PRINCIPAL AND AGENT. 1.

THIRD-PARTY NOTICE—Service out of jurisdiction—Contribution - - 287
See PRACTICE. 7.

TIME—Debentures—Registration—Extension of time—Protection of creditors - 79
See COMPANY. 3.
—— Debentures — Registration — Extension of time—Protection of creditors—Winding-up - - - - - 396
See COMPANY. 4.

TITLE — Adverse title — Constructive notice — Notice by tenancy - - - 428
See VENDOR AND PURCHASER. 4.
—— Doubtful title—Purchaser for value without notice - - - - 599
See SETTLED LAND. 9.
—— Registration—Conditions annexed to title—Modification—Consent - - 674
See LAND TRANSFER.

TOLLS — Equality — Undue preference — Ultra vires - - - - - 369
See RAILWAY. 2.

TRADE—Restraint of—Covenant—"Interested" in similar business — Servant — Fixed salary - - - - 950
See RESTRAINT OF TRADE.

TRADE-MARK—*Rectification of Register—Combination of Devices—Essential Particulars—Prior Mark—Non-distinctive Addition — Simultaneous Visibility — Too wide Registration — Patents, Designs, and Trade Marks Acts*, 1883 (46 & 47

TRADE-MARK—*continued.*

Vict. c. 57), *s.* 64; 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

A trade-mark consisting of a combination of devices on labels was registered on an application which stated the essential particulars as follows:—

"The essential particulars of the trade-mark is the combination of devices, and we disclaim any right to the exclusive use of the added matter except in so far as it consists of our own name and address."

The labels appeared on the application and register in the manner in which they were used:—

Held, that the essential particulars were sufficiently stated within the meaning of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888.

A registered trade-mark will not be removed at the instance of a rival trader merely because it consists of a combination of a prior mark with a non-distinctive addition.

In re Player & Sons' Trade-mark, [1901] 1 Ch. 382, distinguished.

It is not necessary that all the parts of a combination should appear on one label or be visible at once.

In re Spencer's Trade-marks, (1886) 3 Rep. Pat. Cas. 73, followed.

If a mark is registered for too wide a class of goods, the proper remedy is restriction, not removal.

Edwards v. *Dennis*, (1885) 30 Ch. D. 454, followed. *In re* A. & A. Crompton & Co.'s Trade-mark - - **Swinfen Eady J. 758**

2. —— *Registration—"Distinctive Word"—"Addition" to Trade-mark—Addition registered as Part of Trade-mark—"Disentitled to Protection"—Disclaimer—Disclaimer subsequent to Application for Registration—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 73, 74.

In 1887 the F. Company registered, in connection with jams, a trade-mark consisting of the word "Silverpan" in large type with their signature underneath, and subsequently the word by itself became identified in the market with their goods. In 1900 the R. Company, rival jam manufacturers, applied that the entire trade-mark might be removed from the register as "being calculated to deceive or otherwise disentitled to protection," within s. 73 of the Patents, Designs, and Trade Marks Act, 1883, or, in the alternative, that the word "Silverpan" might be disclaimed under s. 74 as being a "distinctive word":—

Held, by the Court of Appeal (reversing Kekewich J.), that the word "Silverpan" was to be regarded as an "addition" to, and not part of, the trade-mark, and that at the date of registration it was a word "distinctive" of the F. Company's goods, that is, "primâ facie distinctive": *Burland* v. *Broxburn Oil Co.*, (1889) 42 Ch. D. 274; and, therefore, ought to have been disclaimed under s. 74; but, the F. Company submitting, an order was made to remove the entire trade-mark from the register.

In re Clément & Cie.'s Trade-mark, [1900] 1 Ch. 114, and *In re Smokeless Powder Co.'s Trade-mark*, [1892] 1 Ch. 590, approved of and distinguished.

Per Romer L.J.: The word "distinctive" in s. 74 means something which, at the time of registration, is chosen by the applicant and is primâ facie suitable, when used, for the purpose of distinguishing his goods from the goods of others.

Whether a disclaimer under s. 74 can be made or ordered subsequently to the application for registration of the trade-mark, *quære*. *In re* Faulder & Co.'s Trade-mark - **C. A. 125**

3. —— *Registration—"Invented Word"—Non-descriptive Word—Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

The word "Uneeda," being a mere misspelt combination of the English words "You need a," is not an "invented word" within the meaning of s. 10 of the Patents, Designs, and Trade Marks Act, 1888. Moreover, it is descriptive of the character or quality of the goods: and on both these grounds it is not the proper subject of registration as a trade-mark.

Decision of Cozens-Hardy J., [1901] 1 Ch. 550, affirmed. *In re* "Uneeda" Trade-mark **C. A. 783**

TRANSFER—Shares—Registration—Transfer in blank—Equitable mortgage—Notice—Priority - - - - **522**
See Company. 12.

TRUST—Secret trust—Absolute gift—Charity—Trust for benefit of public, but so that they should acquire no rights - **403**
See Will. 2.

—— For sale—Right of trustees to retain land unsold - - - - **841**
See Charity. 2.

TRUSTEE—*Administration—Trustees carrying on Testator's Business—Defaulting Trustee—Claim by Creditors of the Business—Indemnity.*

Where a testator's business is carried on after his death by his trustees under a power in the will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter. *In re* Frith. Newton *v.* Rolfe - - **Kekewich J. 342**

2. —— *Breach of Trust—Improper Investment by Trustees—Power to invest on Real Security in Ireland—Puisne Mortgage—Relief under Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The trustees of a marriage settlement were thereby directed to invest the trust funds in (among other alternative modes of investment) Government securities of India, or on freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland, and were empowered to vary investments with the consent of the husband and wife during their joint lives. Lands in Ireland, which were already subject to mortgages for 4700*l.* and 2460*l.*, were further mortgaged for a sum of 17,900*l.*, which was by

TRUSTEE—*continued.*

subsequent payments reduced to 12,150*l.* There were three sub-mortgages of the last-mentioned mortgage for the sums of 4000*l.*, 2153*l.*, and 5000*l.* respectively. The trustees of the marriage settlement, without the consent of the wife, sold out India stock forming part of the trust funds, and invested the proceeds thereof on a transfer of the third sub-mortgage for 5000*l.* They took no legal advice as to the propriety of this investment before making it. In an action against the surviving trustee of the settlement for breach of trust:—

Held, without deciding whether a puisne mortgage on land in Ireland is of necessity and in all cases an improper investment for trust funds, that an investment of such a nature as the trustees had made in the case before the Court was a breach of trust, and that, under the circumstances, the defendant ought not to be relieved from liability in respect thereof under the Judicial Trustees Act, 1896, s. 3. CHAPMAN *v.* BROWNE **C. A. 785**

3. —— *Breach of Trust—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—"*Action to which no existing Statute of Limitations applies*"—*Property* "*received by Trustee and converted to his use*"—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Executor when becoming Trustee.*

A testator bequeathed his personal estate to three trustees and executors upon trust for conversion and investment to provide an annuity to be paid to his wife during her life, and to divide the residue, and also the annuity fund at his wife's decease, into four shares, one of which was settled on a niece of the testator for life with remainder to her children, and the other three were divisible between the three executors equally. After the death of the widow the executors and trustees divided the fund set apart to answer the annuity, and instead of retaining the settled share, paid it away to the tenant for life. More than six years, and less than twelve years, after the death of the tenant for life, one of her children brought an action against the representatives of the three executors and trustees for an account of the settled share, and payment of what should be found due to the plaintiff:—

Held, that it must be assumed that the executors and trustees of the will acted duly in the administration of the estate, and became trustees of the fund upon the express trusts declared by the will, and that the action was not an action for a legacy within the Real Property Limitation Act, 1874, but was brought against the defendants in the character of trustees and not of executors, and was "one to which no existing Statute of Limitations" applied within the Trustee Act, 1888, s. 8, sub-s. 1 (*b*):

Held, also, that as each of the executors and trustees received only the share which was payable to him by the terms of the will, it could not be held that a part of the settled share was received by him and "converted to his use" within the meaning of the exception contained in the earlier part of sub-s. 1 of s. 8 of the Act of 1888:

Held, therefore, that the action was barred

TRUSTEE—*continued.*

under s. 8 of the Act of 1888 by the lapse of six years from the time when the right of action accrued. *In re* TIMMIS. NIXON *v.* SMITH **Kekewich J. 176**

4. —— *Discharge—No new Trustee Appointed—Administration Action—Jurisdiction—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 25.

In an action to administer a trust the Court has jurisdiction to discharge a trustee without appointing a new trustee in his place.

Courtenay v. *Courtenay*, (1846) 3 J. & La T. 519, 533, followed.

This cannot be done under s. 25 of the Trustee Act, 1893, as it is not the practice to reappoint continuing trustees in place of themselves and a retiring trustee.

In re Aston, (1883) 23 Ch. D. 217, applied. *In re* CHETWYND'S SETTLEMENT. SCARISBRICK *v.* NEVINSON **Farwell J. 692**

—— Infant—Advowson—Patron—Trustees to present during minority **400**
See ECCLESIASTICAL LAW.

—— Infant tenant for life—Possession during minority—Guardian **391**
See SETTLED LAND. 8.

—— Mansion-house—Dilapidations—Salvage—Repairs—Expenditure out of capital—Jurisdiction **15**
See WILL. 7.

—— Mortgage—Reconveyance—Married woman—Trustee mortgagee—Separate acknowledgment **451**
See DEED.

—— Parties—Adding defendant—Joint and several liability of trustees **911**
See PRACTICE. 6.

—— Resulting trust—Policy made payable to another—Purchase in name of stranger—Presumption of intention **282**
See INSURANCE, LIFE.

—— Service out of jurisdiction—Third-party notice—Contribution **287**
See PRACTICE. 7.

—— Settled Land Acts, Trustees for purposes of—Tenant for life trustee—Future trust for sale **258**
See SETTLED LAND. 7.

—— Trustee for sale—Sale to ex-trustee twelve years after his retirement **244**
See VENDOR AND PURCHASER. 5.

—— Turnpike trustees—Road originally conveyed in fee—Vesting in urban authority—Overhead wires **866**
See LOCAL GOVERNMENT.

TRUSTEE IN BANKRUPTCY—Shares—Bankruptcy of member—Rectification of register **467**
See COMPANY. 10.

TURNPIKE TRUSTEES—Road originally conveyed in fee—Vesting in urban authority—Overhead wires **866**
See LOCAL GOVERNMENT.

ULTRA VIRES—Objects—Ancillary powers—Declaration that all clauses independent—Injunction - - - 745
See COMPANY. 7.

—— Tolls—Equality—Undue preference 369
See RAILWAY. 2.

UNDIVIDED SHARES—Power of sale—Several persons constituting tenant for life 335
See SETTLED LAND. 5.

VENDOR AND PURCHASER—*Conditions of Sale—Delay—Interest—Damages—Loss of Expected Profits.*

A purchaser cannot be compelled to pay interest for delay under a condition that "the purchaser in default" shall pay interest on the remainder of his purchase-money, where the delay has been occasioned by the default of the vendor.

Damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract. JONES *v.* GARDINER **Byrne J. 191**

2. —— *Conditions of Sale—Interest on Purchase-money — Wilful Default — Dispute as to —Wording of Conveyance—Specific Performance Order for Account of Rents and Profits—Vendor in occupation of Land Sold—Occupation Rent—Farming Losses.*

By an agreement for the sale of real estate it was provided that if from any cause whatever other than wilful default on the part of the vendors the purchase was not completed on January 2, 1899, the purchase-money should bear interest at 5 per cent. A dispute arose about the wording of the conveyance, and the purchase was not completed on the day fixed; the purchaser brought an action for specific performance, and Buckley J. held that the vendors had been wrong in the dispute and gave judgment for specific performance with costs. The master by his certificate found that interest was payable on the purchase-money, and the purchaser took out a summons to vary the certificate by disallowing the interest, on the ground that the delay had been caused by the wilful default of the vendors:—

Held, that there had been no wilful default on the part of the vendors, and that the delay had not been caused by the dispute about the form of the conveyance.

The definition of wilful default given in *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, has only been modified to the extent that in *In re London Corporation and Tubbs' Contract*, [1894] 2 Ch. 524, it was held that cases of honest mistake did not constitute wilful default. No distinction has been drawn for this purpose between mistakes of title and mistakes of conveyance.

After the commencement of the action one of the farms agreed to be sold fell vacant. The vendors did not let it, but occupied it themselves, paid the valuation of the outgoing tenant, and farmed the land:—

Held, that under the account of rents and profits directed by the order for specific performance (which was not on the footing of wilful default) the vendors must be charged with rents and profits, and the proceeds of sale of crops actually received, but not with an occupation rent; that they were entitled to be allowed what they had paid for the valuation and the expenses of realizing the crops, but not for the losses incurred in farming. BENNETT *v.* STONE **Buckley J. 226**

3. —— *Deposit — Contract for Purchase of Land—Contract determined without Default of Purchaser—Lien for Deposit—Power to Purchaser to rescind in given Event—Rescission.*

The purchaser of real estate has a lien on the property for his deposit when the contract for purchase is determined without any default on his part, not only when it is determined by reason of the default of the vendor.

A contract for the purchase of land empowered the purchaser to rescind the contract on the happening of a specified event. In exercise of this power the purchaser rescinded the contract:—

Held, that the purchaser had a lien on the land for the deposit which he had paid.

Decision of Farwell J., [1901] 1 Ch. 911, affirmed. WHITBREAD & Co. *v.* WATT **C. A. 835**

4. —— *Title — Adverse Title — Constructive Notice—Notice by Tenancy—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.

The occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights.

Actual knowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the vendor is constructive notice of that person's rights; but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all.

Decision of Farwell J., [1901] 1 Ch. 45, affirmed.

Barnhart v. *Greenshields*, (1853) 9 Moo. P. C. 18, followed.

Dictum of Jessel M.R. to the contrary in *Mumford* v. *Stohwasser*, (1874) L. R. 18 Eq. 556, 562, disapproved. HUNT *v.* LUCK - **C. A. 428**

5. —— *Trustee for Sale—Retirement — Purchase of Trust Property—Sale to Ex-trustee Twelve Years after his Retirement.*

Apart from any circumstances of doubt or suspicion, there is no rule of the Court that a person, who has ceased for twelve years to be a trustee of an instrument which contains a trust for sale, cannot become a purchaser of property subject to the trust. *In re* BOLES AND BRITISH LAND COMPANY'S CONTRACT - **Buckley J. 244**

6. —— *Will — Special Executors — General Executors—Sale by General Executors—Concurrence of Special Executors—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65, *ss.* 1, 2 *sub-s.* 2, 24 *sub-s.* 2.

Where by his will a testator appoints special

VENDOR AND PURCHASER—*continued.*
executors as to property situate in a foreign country or in the Colonies, and by the same will appoints other persons general executors of his will, on a sale by the general executors of the testator's real estate in England a good title can be shewn thereto without the concurrence of the special executors. *In re* COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL - **Byrne J. 187**
—— Doubtful title—Purchaser for value without notice - - - - 599
See SETTLED LAND. 9.
—— Sheriff's costs—"Deduction" from purchase-money—Lands Clauses Act - 326
See PRACTICE. 3.
—— Tenant for life trustee—Trustees for purposes of Settled Land Acts - 258
See SETTLED LAND. 7.

VESTED—Or contingent—Residue to individuals in shares, Gift of—Gift of income for maintenance of all - - - 945
See WILL. 10.

VESTING—Bequest to descend with dignity—Period of absolute vesting - 807
See HEIRLOOMS.

VOTING—Shares—Agreement to vote in a particular way—Executors—Directors 530
See COMPANY. 9.

WARD OF COURT—Testamentary guardian—Guardian's change of religion—Removal of guardian - - - - 688
See INFANT. 2.

WARRANTY—Attorney innocently acting under forged power—Liability of agent—Third party—Indemnity - - - 610
See PRINCIPAL AND AGENT. 1.

WATER—*Artificial Watercourse—Riparian Proprietors—Right to Use of Water—Nature of Presumed Lost Grant.*

In the case of an artificial watercourse, the origin of which is unknown, the proper inference from the user of the water and from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights (including a right to use the water for manufacturing purposes) as they would have had if the stream had been a natural one.

Sutcliffe v. *Booth*, (1863) 32 L. J. (Q.B.) 136, followed.

The use of the water by a riparian proprietor for manufacturing purposes must be, as was laid down in *Miner* v. *Gilmour*, (1858) 12 Moo. P. C. 131, at p. 156, such as not to interfere with the lawful use of the water by the other proprietors, above or below him, or to inflict on them a sensible injury.

The plaintiffs were the owners of a mill, which was situate upon an artificial cut or channel, the water flowing through which was used for working the mill. The water was admitted into the cut from a natural river. The cut was about a mile and a half long, and it rejoined the river at its lower end. The plaintiffs also owned a factory, near to the mill, but a little higher up the stream. For the purposes of the factory the plaintiffs abstracted water from the stream, returning what they abstracted to the stream below the mill.

The defendants owned a factory higher up the stream. For the purposes of the factory they abstracted water from the stream, returning it diminished in quantity by evaporation.

The plaintiffs brought the action to restrain the defendants from abstracting water so as to injure their mill. The plaintiffs claimed a right to the whole of the water in the channel. The artificial stream was known to have existed for some centuries, but there was no evidence as to when or by whom, or on what conditions, it had been originally constructed. The admission of water to the cut had always been under the control of the mill-owner, who had always kept the channel clear and had repaired its banks. The defendants' factory was situate on the site of an old tannery, for the purposes of which water used to be abstracted from the stream, though it was alleged that the defendants had increased the amount abstracted.

There was evidence that there had formerly been a fulling-mill upon the stream above the plaintiffs' mill.

Held, by the Court of Appeal, that the proper inference from the user of the water was that the artificial cut had been originally constructed upon the terms that all the riparian proprietors should have at least the same rights in regard to the use of the water as they would have had if the stream had been a natural one.

The evidence satisfied the Court of Appeal that the abstraction of water by the defendants had not been such as to cause sensible injury to the plaintiffs' mill, and that, therefore, the defendants ought not to be restrained from abstracting water.

Decision of Byrne J. reversed. BAILY & Co. *v.* CLARK, SON & MORLAND - - **C. A. 649**

WIFE—Husband and.
See under HUSBAND AND WIFE.

"WIFE"—Named legatee misdescribed as wife
See WILL. 8. 936

WILFUL DEFAULT—Conditions of sale—Interest on purchase-money - - 226
See VENDOR AND PURCHASER. 2.

WATERCOURSE.
See under WATER.

WILL—*Absolute Gift—Property or Power—Gift of Income—Life Tenant—Power to use Capital if Income not "sufficient"—Power of Appointment.*

Bequest of the income of an estate to testator's wife for life with a direction that "in case such income shall not be sufficient she is to use such portion of" the capital "as she may deem expedient." On wife's decease "what is left" of the capital to be divided among certain residuary legatees:—

Held, that the wife has a general power of appointment over the capital during her life.

Re Pedrotti's Will, (1859) 27 Beav. 583, distinguished.

Whether the wife can appoint by will, *quære*. *In re* RICHARDS. UGLOW *v.* RICHARDS
Farwell J. 76

WILL—*continued*

2. —— *Absolute Gift—Secret Trust—Charity—Trust for Benefit of Public, but so that they should acquire no Rights.*

The testator established a museum, and laid out a portion of his estate as a pleasure ground, and maintained the same for the benefit of the public, whom he admitted thereto under certain restrictions, while reserving to himself his private rights. By his will he devised and bequeathed the museum and pleasure grounds and an annuity of 300*l.* for the maintenance of the same to his son. It was alleged that these gifts were really subject to a secret trust in favour of the public:—

Held, on the evidence, that it was proved that the testator intended his son to maintain the museum and grounds and allow the public access thereto as before, and that the son accepted the gifts with the assurance that this should be done; but that the testator intended that the public should acquire no rights, and therefore that no charitable trust had been created.

Decision of Kekewich J., [1901] 1 Ch. 352, reversed. *In re* PITT RIVERS. SCOTT *v.* PITT RIVERS - - - - - **C. A. 403**

3. —— *Collective Devise of Real Estates—Aggregation of Charges—Exoneration of Personal Estate—Construction of Will—Locke King's Acts (Real Estate Charges Acts)*, 1854, 1867, 1877 (17 & 18 *Vict. c.* 113; 30 & 31 *Vict. c.* 69; 40 & 41 *Vict. c.* 34).

Since Locke King's Acts a collective devise of lands of any tenure to the same set of persons prima facie throws the aggregate charges on to the aggregate lands in exoneration of the testator's personal estate.

Ratio decidendi of *Talbot* v. *Earl Radnor*, (1834) 3 My. & K. 252; 41 R. R. 64; *Fairtlough* v. *Johnstone*, (1865) 16 Ir. Ch. Rep. 442; *Syer* v. *Gladstone*, (1885) 30 Ch. D. 614; *In re Hotchkys*, (1886) 32 Ch. D. 408, and *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511, explained and applied. *In re* BARON KENSINGTON. EARL OF LONGFORD *v.* BARON KENSINGTON

Farwell J. 203

4. —— "*Furniture and other Personal Effects*," *Gift of—Effect as regards Fixtures and Trade Furniture—Construction of Will.*

Testator was an innkeeper carrying on business at, and the yearly tenant of, the Roebuck Hotel, where there were furniture and effects, some part of which was used by him personally and the rest for the purposes of the hotel business; also trade and tenant's fixtures.

By his will he bequeathed "all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel," to W., and he gave the residue of his personal estate to other persons:—

Held, that W. was entitled to the furniture, linen, plate, glass, china, and other effects at the hotel, whether used for domestic purposes or for the purposes of the hotel business; but not to the trade or tenant's fixtures. *In re* SETON-SMITH. BURNAND *v.* WAITE - - **Buckley J. 717**

5. —— "*Issue*"—*Estate in Special Tail—Rule in Shelley's Case—Construction of Will.*

A devise to "Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants, in failure of which" then over:—

Held, to be equivalent to a devise to "Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendants, in failure of which" then over, and thus to create an estate in special tail male in Charles.

Decision of Buckley J. affirmed. PELHAM CLINTON *v.* DUKE OF NEWCASTLE - **C. A. 34**

6. —— *Legatee entitled to Share on surviving Testator—Disappearance in Testator's Lifetime—No Evidence of Death—Presumption—Onus Probandi.*

In September, 1892, P., who was then twenty-four years of age, disappeared, and he had never since been heard of. Under his father's will he was entitled to a share of the residuary estate in the event of his surviving the testator. The testator died in June, 1893. Upon a summons taken out by the trustees in 1900 to have it determined how P.'s share ought to be dealt with:—

Held, that P. must be presumed to be dead, and, in the absence of proof that he had survived the testator, the Court, without making any declaration as to the date of P.'s death, gave the trustees liberty to distribute his share on the footing that he had predeceased the testator. *In re* BENJAMIN. NEVILLE *v.* BENJAMIN

Joyce J. 723

7. —— *Mansion-house—Devise to Trustees—Bare Legal Estate—Powers of Management, Absence of—Tenant for Life and Remainderman—Equitable Estates—Dilapidations—Salvage—Repairs—Expenditure out of Capital—Jurisdiction.*

A testator devised a freehold mansion-house to the use of trustees in trust for his sister for life, "subject to the condition that she shall keep the said premises in the state of repair in which she finds them at my death," with remainder in trust for his nephews successively for life subject to the same condition, with remainders over. And he bequeathed personal estate upon trusts corresponding to those of the mansion-house. The will did not impose on the trustees any trusts whatever for the management, maintenance, or repairs of the mansion-house. At the testator's death the house was in general disrepair. Upon the application by the trustees as to whether they could apply capital moneys in their hands in putting the house into good repair:—

Held, affirming Kekewich J., that as the evidence did not shew the case to be one of "salvage," the Court could not, either under the Settled Land Acts (which admittedly did not apply) or its general jurisdiction, authorize the proposed expenditure.

The rule laid down by Chitty J. in *In re De Teissier's Settled Estates*, [1893] 1 Ch. 153, 165, approved of and applied. *In re* WILLIS. WILLIS *v.* WILLIS - - - - **C. A. 15**

8. —— *Misdescription — "Wife" — Named Legatee misdescribed as Wife—Construction of Will.*

A testator bequeathed a fund upon trust,

WILL—*continued.*

after a trust to pay the income to his son, to pay the income "to my son's wife L. if she shall survive him." The son, who lived in the Colonies, had written to his father that he had married a lady named L. C. L. C. lived with the son as his wife till his death and was reputed to be his wife, but she was not married to him. The testator never had any direct communication with L. C.:—

Held, upon the construction of the will, that inasmuch as the identity of the legatee was established by her name, the annexed misdescription of her as the son's wife did not vitiate the gift, the Court not being at liberty to speculate as to the motive of the testator in making the gift. ANDERSON *v.* BERKLEY - **Joyce J. 936**

9. —— *Next of Kin—Sister of the Half-blood—Nephews and Nieces—Domicil—Foreign Law—Construction of Will.*

A bequest of personalty in the will of a domiciled Englishman to the "next of kin" of a foreigner must be construed to mean the nearest in blood according to English law, subject to any question of status should it arise.

Accordingly, where a domiciled Englishman bequeathed a legacy to a German, with a direction that in the event of the death of the legatee in his lifetime, which happened, the legacy should not lapse, but be divided among the "next of kin" of the legatee:—

Held, that the next of kin must be ascertained according to English law, and that a sister of the half-blood was therefore entitled, to the exclusion of nephews and nieces who by German law would have had priority. *In re* FERGUSSON'S WILL **Byrne J. 483**

10. —— *Residue of Individuals in Shares, Gift of—Gift of Income for Maintenance of all—Vested or Contingent—Construction of Will.*

Where a testator gives residue to several persons on their attaining twenty-one in equal shares, and directs the income during their respective minorities to be applied for the maintenance of all indiscriminately, the gift will not be vested; *secus*, if the direction be to apply the income of the respective shares of each for his or her maintenance.

Fox v. *Fox*, (1875) L. R. 19 Eq. 286, distinguished. *In re* GOSSLING. GOSSLING *v.* ELCOCK - - - **Swinfen Eady J. 945**

—— Appointment.
See Cases under POWER OF APPOINTMENT.

—— Charity—Will—Construction.
See Cases under CHARITY.

—— Election—Appointment void for remoteness
See POWER OF APPOINTMENT. 3. **436**

—— Estate duty—Appointed fund—Residue—Testamentary expenses - - **248**
See REVENUE.

—— Heirlooms—Dignity—Period of absolute vesting—Perpetuity - - **537**
See HEIRLOOMS.

—— Lease in consideration of premium—Operation of appointment on premium - **100**
See POWER OF APPOINTMENT. 4.

WILL—*continued.*

—— Power of appointment—Blending of appointed property with testator's own property - - - - **314**
See POWER OF APPOINTMENT. 2.

—— Sale by general executors—Concurrence of special executors - - - **187**
See VENDOR AND PURCHASER. 6.

—— Unattested will — Domiciled foreigner — Leaseholds - - - - **24**
See CONFLICT OF LAWS. 1.

—— Words—"all the Share of my late husband's estate," Gift of - - - **512**
See LIMITATIONS, STATUTE OF.

WINDING-UP OF COMPANY.
See under COMPANY.

WIRES—Street—Overhead wires - - **866**
See LOCAL GOVERNMENT.

WORDS—"Addition" - - - **97**
See SETTLED LAND. 2.

—— "Best rent" - - - - **599**
See SETTLED LAND. 9.

—— "Capital money" - - - **100**
See POWER OF APPOINTMENT. 4.

—— "Charitable institution" .. - **876**
See CHARITY. 4.

—— "Circulating capital" - - - **353**
See COMPANY. 6.

—— "Deduction" from purchase-money - **326**
See PRACTICE. 3.

—— "Distinctive word" - - - **125**
See TRADE-MARK. 2.

—— "Dividend" - - - - **353**
See COMPANY. 6.

—— "Fixed capital" - - - **353**
See COMPANY. 6.

—— "Furniture and other personal effects"
See WILL. 4. **717**

—— "Interest" - - - - **353**
See COMPANY. 6.

—— "Interested" - - - - **950**
See RESTRAINT OF TRADE.

—— "Invented word" - - - **783**
See TRADE-MARK. 3.

—— "Issue" - - - - - **34**
See WILL. 5.

—— "Land" - - - - - **841**
See CHARITY. 2.

—— "during the Marriage" - - **82**
See SETTLEMENT. 1.

—— "Next of kin" - - - - **483**
See WILL. 9.

—— "Persons principally interested" - **674**
See LAND TRANSFER.

—— "Prodigal" - - - - **488**
See CONFLICT OF LAWS. 2.

—— "Profit" - - - - **353**
See COMPANY. 6.

—— "Property" - - - - **332**
See COMPANY. 1.

WORDS—*continued.*
—— "Purchaser" - - - - 636
See INHERITANCE.
—— "Required" - - - - 87
See SETTLED LAND. 10.
—— "Right heirs" - - - - 636
See INHERITANCE.
—— "all the Share of my late husband's estate"
See LIMITATIONS, STATUTE OF. 512
WORDS—*continued.*
—— "Substantial" interference - - 302
See LIGHT AND AIR.
—— "Sufficient" - - - - 76
See WILL. 1.
—— "Wife" - - - - - 936
See WILL. 8.
—— "Written instrument" - - 898
See PRACTICE. 5.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

BIBL. LONDIN UNIV.